IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

—v.—

NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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Docket Entries

At a Term of the County Court held in and for the County of Westchester in the Court House, in the City of White Plains, N. Y. on the 25th, day of January, 1966.

Court met pursuant to recess

PRESENT: HON. ROBERT J. TRAINOR, COUNTY JUDGE, PART I

Special Deputy County Clerk F. J. McNulty

Stenographer J. W. Roberts

Proclamation made and Court opened

The Acting Foreman of the January Grand Jury came into Court and handed up the following 29 indictments, 1 Information as his partial report and then continued on to do his work.

* * * *

Indictments

* * * *

Viven Harris

Fel. selling narcotic drug in Viol. 3305 P.H.L., viol. 1751 subd. 1 Penal Law (2 cts) Indict. #50-66

THURSDAY, JULY 21st, 1966

At a Term of the County Court held in and for the County of Westchester in the Court House, in the City of White Plains, N.Y. on the 21st, day of July, 1966.

Court met pursuant to recess

PRESENT: HON: P. RAYMOND SIRIGNANO, COUNTY JUDGE, PART I

Special Deputy County Clerk F. J. McNulty

Stenographer P. Thompson

Proclamation made and Court opened

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in violation 3305 P.H.L. & 1751 (1) P.L. (2); Indict. #50-66

James J. Duggan A.D.A.
L. Martin

Court fixes bail in the sum of $25,000.00.

Defendant remanded.

WEDNESDAY, NOVEMBER 30th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

Stenographer Bernard Fabel

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in violation 3305 P.H.L. & 1751 (1) P.L. (2); Indict. #50-66

Thomas Facelle A.D.A.
R. Projansky

Defendant present.

Mr. Projansky challenges the array of the prospective jurors.

Mr. Facelle moves Indict. #50-66 for trial and opposes the Motion.

Hearing set for Thursday, December 1st, 1966 at 9:00 A.M.

The Panel of Jurors is excused.

Defendant remanded.

THURSDAY, DECEMBER 1st, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

Stenographer Bernard Fabel

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in viol. 3305 P.H.L. & Sec. 1751 subd. 1 Penal Law (2); Indict. #50-66

Thomas Facelle A.D.A.
E. McHugh by R. Projansky
of counsel

Hearing on challenge to the array of prospective jurors. Defendant present.

WITNESS SWORN

Ralph. T. Mumford

Defendant rests.

The challenge to the array is denied.

Defendant remanded for trial on December 5th, 1966.

MONDAY, DECEMBER 5th, 1966

At a term of the County Court held in and for the County of Westchester in the Court House, in the City of White Plains, N.Y. on the 5th day of December 1966

Court met pursuant to recess

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

Stenographer Bernard Fabel

Proclamation made and Court opened

THE PEOPLE

vs

VIVEN HARRIS

2 cts: Feloniously selling narcotic drug in violation 3305 P.H.L. & 1751 (1) P.L. (2); Indict. #50-66

T. A. Facelle A.D.A.
E. McHugh by R. Projansky of counsel

Defendant present.

Mr. Facelle moves Indictment #50-66 for trial.

The Clerk advised the defendant pursuant to Sec. 369 Code of Criminal Procedure of his right to challenge individual jurors.

The following jurors were examined, challenged or excused as shown:

Dina Ebenstein	by consent
Anthony Arancio, Jr.	by consent

Trial recessed at 4:10 P.M.

The Court admonished jurors pursuant to Sec. 415 Code of Criminal Procedure.

Defendant remanded.

TUESDAY, DECEMBER 6th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

The selection of jurors continued.

Joseph V. Chuea	Peremptory	defendant
Clarance S. Bonney	Peremptory	defendant
Charles W. Johnson	Peremptory	defendant
Edward J. Burrell	Peremptory	defendant
Frederick G. Gylassen	Peremptory	defendant
Lucy K. Mead	Peremptory	defendant

Jurors #1-3-4-6-9-10 selected and sworn.
George White #1
Blanche K. Brill #2
Clarence W. Ostergren #4
Gerd H. Shendler #6
Onita M. Ocasio #9
Gilbert J. Stevens #10

The Court recessed at 4:50 P.M.

The Court admonished the Jurors pursuant to sec. 415 C.C.P.

Defendant remanded.

WEDNESDAY, DECEMBER 7th, 1966

HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

Selection of jurors resumed at 11:05 A.M.
Defendant present.

Frank L. Backus	by consent
Alfred J. Lalli	by consent
Thomas H. Lane	by consent

Prospective juror #11 Thomas H. Lane is absent—another juror selected from the drum as prospective Juror #11

George P. Farrell	Peremptory	
David Harris		by consent

Court recessed for luncheon at 12:30 P.M.

Jury admonished pursuant to sec. 415 C.C.P.

Defendant remanded.

Selection of the jury resumed at 2:00 P.M.

John H. Judge	peremptory	by defendant
Katherine H. Gosselina	peremptory	by defendant
Levon K. Nahigian	peremptory	by defendant
Murray Winokor	peremptory	by defendant
Raymond O. Walsh	peremptory	by defendant
Roland B. Forsgth	peremptory	by defendant
Edmund B. Van Hook, Jr.	peremptory	by defendant
Lydia G. Gallagher	peremptory	by defendant

Juror #11 Kenneth B. Heller sworn.

WEDNESDAY, DECEMBER 7th, 1966
(Continued)

Juror #2 Edmond P. Donlon Juror #5 Roberta Juror #12 Sherman Turner sworn Juror #7 William F. Holth sworn

The Jury selected. Roll called—Jury sworn.

JURY SWORN

George R. Wyhte
Edmond P. Donlon
Blanche K. Brett
Clarence H. Ostergren
Roberta J. McCanney
Gerd H. Shindler
William F. Holth
Adolf E. Schlessinger
Anita M. Acasio
Gilbert J. Stevens
Kenneth B. Heller
Sherman Turner

The Court directed the Clerk to select and swear in two Alternate Jurors pursuant to Sec. 358-a Code of Criminal Procedure.

John D. Fors	by consent
Walter Freedman	by consent

Two alternate jurors were selected and sworn.

ALTERNATE JURORS SWORN

Evelyn P. Nazaruk
Victor J. Jenkens

Trial recessed at 4:20 P.M.

Jury admonished pursuant to Sec. 415 Code of Criminal Procedure.

Defendant remanded.

THURSDAY, DECEMBER 8th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

Trial resumed at 9:10 P.M.

Defendant present.

Roll called—All twelve Jurors and two alternate jurors present.

Opening statements by Messr. Facelli and Projansky.

Trial recessed at 9:40 A.M. for the call of the calander.

Jury admonished pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 12:00 P.M. Defendant present.

WITNESS SWORN

Det. George Bernuder

Court recessed for luncheon at 12:35 P.M.

Jury admonished pursuant to Sec. 415 Code of Criminal Procedure.

Defendant remanded.

Trial resumed at 2:05 P.M. Defendant present.

Roll called. All 12 Jurors and two Alternate Jurors present.

WITNESS SWORN

Det. George Bernuder (resumed)

Court recessed at 4:40 P.M.

The Court admonished jurors pursuant to Sec. 415 C.C.P. Defendant remanded.

FRIDAY, DECEMBER 9th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
same appearances
case continued

Trial resumed at 11:45 A.M. Defendant present.

Roll called—All 12 jurors and 2 alternate jurors present.

In chambers in the presence of the defendant and the absence of the jury, Mr. Projansky moves to dismiss the indictment on the grounds of the grand jury minutes of the witness George Bernuder.

Defendant remanded.

Decision reserved. Motion denied.

WITNESS SWORN

Det. George Bernuder (resumed)

Court recessed at 12:25 P.M. for luncheon.

Jury admonished pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 2:25 P.M. Defendant present.

Roll called—All 12 jurors and 2 alternate jurors present.

WITNESS SWORN

Det. George Bernuder (resumed)

Court recessed at 3:30 P.M. Court admonished jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

FRIDAY, DECEMBER 9th, 1966
(Continued)

Trial resumed at 4:25 P.M., Defendant present.

All 12 jurors and 2 alternate jurors present.

WITNESSES SWORN

Det. George Bernuder
Det. Frank Scheur
Det. Richard D. Parks

People rest.

Court recessed at 6:30 P.M. for dinner.

Court admonished jurors pursuant to Sec. 415 C.C.P.

Mr. Projansky renews motion to have verdict of acquital. Motion denied. Motion to have indictment dismissed on the grounds defendant did not get a preliminary hearing. Motion denied. Mr. Projansky moves to dismiss indictment on the grounds that People have failed to prove a prima facie case. Motion denied.

Defendant remanded.

Trial resumed at 8:05 P.M. Defendant present, Mr. Facelli, A.D.A. present, Mr. Projansky, Attorney for the defendant present.

All 12 jurors and 2 alternate jurors present.

The Court adjourned until Monday, December 12th, 1966 at 10:30 A.M.

The Court admonished the jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

MONDAY, DECEMBER 12th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
Same appearances
Case continued

Trial resumed at 11:40 A.M. Defendant present.

Roll called—All 12 jurors and 2 alternate jurors present.

Defendant himself moves for a new lawyer. Motion denied.

WITNESS SWORN

Luther Harris

In Chambers, defendant present, in jurys absence, court advised the witness of his rights to remain silent to any question which might tend to incriminate him, the witness.

Defendant present. Trial recessed for luncheon at 12:25 P.M. The Court admonished the jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 2:15 P.M. Defendant present.

Roll called—All 12 Jurors and 2 Alternate Jurors present.

WITNESS SWORN

Viven Harris

Mr. Projansky moves for withdrawal of a Juror and a mistrial. Motion denied.

WITNESS SWORN

Viven Harris (re-direct)

Trial recessed at 4:00 P.M.

The Court admonished the Jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

TUESDAY, DECEMBER 13th, 1966

PRESENT: HON: ROBERT E. DEMPSEY, COUNTY JUDGE, PART II

Deputy County Clerk Irwin S. Bilgre

THE PEOPLE

vs

VIVEN HARRIS

Indict. #50-66
Same Appearances
Case continued

Trial resumed at 9:25 A.M. Defendant present. In absence of the Jury, Mr. Projansky renews his objection to the use of certain statements made by the defendant. Motion denied.

Defendant renews his Motions to dismiss the indictment. Motion denied.

Defendant moves for a direction of acquittal. Motion denied.

The Jury returned to the Courtroom at 9:35 A.M.

Roll called—All 12 jurors and 2 Alternate Jurors present.

Summations made by Mr. Projansky.

Court recessed at 12:20 P.M. for the call of the calendar.

The Court admonished the jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 11:10 A.M. Defendant present.

Summations made by Mr. Facelle.

The Court recessed for lunch at 12:10 P.M.

The Court admonished the Jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Trial resumed at 2:10 P.M. Defendant present.

Roll called—All 12 Jurors and 2 Alternate jurors present.

The Court charged the Jury.

TUESDAY, DECEMBER 13th, 1966
(Continued)

Officers Devine, Wall and Davis sworn pursuant to Sec. 421 C.C.P.

The Court advised the Assistant District Attorney, the Attorney for the defendant and the defendant pursuant to Sec. 425 C.C.P. in reference to the exhibits being sent to the Jury room.

The Assistant District Attorney and the Attorney for the defendant and the defendant personally, consent to the exhibits being sent to the Jury room if requested.

The Court directed that the 2 Alternate Jurors be kept separate and apart from the regular jury until a verdict is reached.

At 5:30 P.M. in the presence of the defendant, the Assistant District Attorney, and Mr. Projansky, counsel for the defendant, a note sent down by the Jurors asking, "Must a verdict for acquital also be a unanimous ballot?" was read. To which Judge Dempsey replied, "A verdict of the acquital of the defendant must be unanimous.

Defendant remanded.

At 6:05 P.M. the Jury returned to the Courtroom for further instructions. Defendant present, Assistant District Attorney present, Mr. Projansky, Attorney for the defendant present.

At 6:10 P.M. the jury retired to continue their deliberations.

Defendant remanded.

At 6:30 P.M. the Jurors recessed for dinner.

The Court admonished the Jurors pursuant to Sec. 415 C.C.P.

Defendant remanded.

Jurors returned to deliberate at 8:05 P.M.

At 9:07 the Jurors returned to the Courtroom and a roll call being taked and all Jurors being present, the Foreman stated on being asked, that their was a dis-

TUESDAY, DECEMBER 13th, 1966
(Continued)

agreement as to the 1st count of the indictment, "Feloniously selling narcotic drug in violation Sec. 3305 P.H.L. and 1751 subd. 1 P.L.

When asked the question "How do you find the defendant Viven Harris as to the 2nd ct. of the Indictment?" the Foreman announced that they find the defendant guilty as charged to Feloniously selling narcotic drug in violation of Sec. 3305 P.H.L. and Sec. 1751 Subd. 1 Penal Law.

At the request of Mr. Projansky, a roll call was taken and to the question "Is your individual verdict the same as that announced by your Foreman?" each juror responded in the affirmative.

The Jury was discharged with the thanks of the Court.

Mr. Projansky moves to set aside the verdict as being contrary to the evidence. Motion denied.

All previous Motions made during the trial are renewed by Mr. Projansky and denied by the Court.

Mr. Projansky moves for a arrest of Judgment. Motion denied.

The defendant being sworn answers all questions as follows:

Name	Viven Harris	Citizen	Yes
Born	Greensboro, No. Carolina	Birth	February 5th, 1942
Resides	34 Lincoln Ave. New Rochelle, N.Y.		
Married	Married (Erling)	Occupation	Gardner-Landscaper
Religion	Protestant	Education	10th grade
Temperate	Abstains	Parents	Mother living
Narcotic drugs	Yes—but not under the influence of drugs at the present time.		

Previous Convictions Stands Mute.

The defendant does not waive the two days notice of sentence.

Defendant remanded for sentence 1 week from today.

DECEMBER 20th, 1966

THE PEOPLE

vs

VIVEN HARRIS

2nd ct: Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 P.L.; Indict. #50-66

James R. Cowhey A.D.A.
E. McHugh

All Motions renewed. Mr. McHugh moves for arrest of judgment. Motion denied.

The aforesaid Viven Harris having been indicted for the crimes of Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 Penal Law (2), and having been convicted of the crime of Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 Penal Law, 2nd ct. of the indictment by a verdict of a Jury and he having answered all questions under oath, and the defendant having had two days notice of sentence (472-CCP); now on being arraigned for sentence and being asked if he had any legal cause to show why judgment should not be pronounced against him (480-CCP) and the defendant answering in the negative it is

ORDERED AND ADJUDGED by the Court, that the said Viven Harris for the offense of Feloniously selling narcotic drug in violation 3305 P.H.L. and 1751 subd. 1 Penal Law, 2nd ct. of Indict. #50-66, whereof he is convicted, be imprisoned in the Sing Sing State Prison at Ossining, N.Y. at hard labor, under an indeterminate sentence, the Maximum of such imprisonment to be 8 YEARS and the Minimum to be 6 YEARS.

AND IT IS FURTHER ORDERED, that the sheriff of Westchester County convey the said defendant to the Sing Sing State Prison of Ossining, N.Y. with conformity of this sentence.

COUNTY COURT : WESTCHESTER COUNTY

INDICTMENT 50-66

THE PEOPLE OF THE STATE OF NEW YORK

—against—

VIVEN HARRIS, DEFENDANT

THE GRAND JURY OF THE COUNTY OF WESTCHESTER, by this Indictment, accuse the defendant of the crime of FELONIOUSLY SELLING A NARCOTIC DRUG, IN VIOLATION OF SECTION 3305 OF THE PUBLIC HEALTH LAW AND SECTION 1751 SUBDIVISION 1 OF THE PENAL LAW, committed as follows:

The defendant, in the City of New Rochelle, County of Westchester and State of New York, on or about the 4th day of January, 1966, unlawfully bartered and exchanged with, and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse the defendant of the crime of FELONIOUSLY SELLING A NARCOTIC DRUG, IN VIOLATION OF SECTION 3305 OF THE PUBLIC HEALTH LAW AND SECTION 1751 SUBDIVISION 1 OF THE PENAL LAW, committed as follows:

The said defendant, in the City of New Rochelle, County of Westchester and State of New York, on or about the 6th day of January, 1966, unlawfully bartered and exchanged with, and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin.

All of the acts and transactions alleged in each of the several Counts of this Indictment are connected together and constitute parts of a common scheme and plan.

All contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

/s/ LEONARD RUBENFELD
District Attorney of
Westchester County

50-66

WESTCHESTER COUNTY
COUNTY COURT

Filed the ..... day of

Pleads

THE PEOPLE OF THE STATE OF NEW YORK

against

VIVEN HARRIS

Fel. Sell, Narcotic Drug, Viol. § 3305 Public Health Law, Viol. 1751 Sdiv. 1 Penal Law (2 Counts)

/s/ LEONARD RUBENFELD
District Attorney

A TRUE BILL

/s/ MARTIN H. SHERWIN
Foreman of Grand Jury

VOLUME II

COUNTY COURT : WESTCHESTER COUNTY

Indictment #50-66

THE PEOPLE OF THE STATE OF NEW YORK

—against—

VIVEN HARRIS, DEFENDANT

* * * *

[fol. 388] VIVEN HARRIS, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

BY THE CLERK:

Q Would you state and spell your name for the Court, please?
A Viven Harris, Viven, Harris.
Q And your address?
A 34 Lincoln Avenue, New Rochelle.

DIRECT EXAMINATION BY MR. PROJANSKY

Q Viven, how old are you?
A 24
Q Now, would you speak up and make your voice loud and clear so that every member of the jury can hear you.
A Yes, sir.
Q Now, where were you born?
A Greensboro, North Carolina.
Q Where did you grow up?
A Greensboro, North Carolina.
Q Did you attend school there?
A I did.
Q And far did you go in school?
A Tenth grade.
Q Are you married?
[fol. 389] A I am.
Q Do you have a family?
A I do.

Q Any children?
A Yes, sir. One.
Q Now, did there come a time when you moved away from Greensboro, North Carolina?
A Yes, sir.
Q When was that?
A About 1962.
Q And where did you move to?
A New Rochelle.
Q And have you lived in New Rochelle ever since then?
A No, sir.
Q Where else have you lived?
A North Carolina, from numerous times, from North Carolina back to New Rochelle.
Q You've moved back and forth?
A Back and Forth.
Q Now Viven, have you ever been convicted of a crime?
A I have.
Q And what was that crime?
A Possession of a weapon.
Q And where were you convicted of that?
[fol. 390] A Greensboro, North Carolina.
Q Have you ever been convicted of any other crime in North Carolina?
A I have.
Q What was that for?
A Escape.
Q From a sentence that you were serving?
A Yes, sir.
Q Have you ever been convicted of any other crime?
A Yes, sir.
Q And where was that?
A Here in New Rochelle, here in White Plains, here in this Court.
Q And when was that?
A Approximately, I believe, May or June 1.
Q Of this year?
A Of this year.
Q And what was that conviction for?

A Possession of a weapon.
Q Now, you saw Detective Bermudez testify in this Courtroom, did you not?
A I did.
Q Did you know Detective Bermudez before he came here to testify?
[fol. 391] A I had saw him.
Q Had you ever met him before?
A Yes, sir, I have.
Q When did you first meet him?
A Oh, around about—it was about the 4th of January.
Q Have you ever seen him before that time?
A I had.
Q Where had you seen him?
A Sickles Avenue.
THE COURT: Where?
THE WITNESS: Sickles Avenue in New Rochelle.
Q When did you first have a conversation with Detective Bermudez?
A The 4th of January.
Q And where did that conversation take place?
A Three-Fours Bar and Grill.
Q On North Avenue in New Rochelle?
A North Avenue, 444 North Avenue.
Q Do you remember about what time of day that was?
A No, sir. I can't remember.
Q Well, was it in the morning, evening, afternoon?
A It was in the evening.
Q Pardon me?
A It was in the evening.
[fol. 392] Q Early or late in the evening?
A I say around about 5:30, maybe 6:00.
Q And was that inside the Three-Fours or outside?
A Inside.
Q And who else was present?
A At this time, Charlie Burkes was present, and Ronnie Sykes.
Q By the way, did you know Detective Bermudez by that name at that time?

A No, sir.
Q What was the name by which you knew him?
A Well, when they introduced me to him that day, they were calling him Joe.
Q Did you know him by any last name?
A No, sir.
Q And what was the substance of that conversation? What he said and what you said?
A Well, I can't remember the exact conversation, it was just small talk and everything.
Q And did there come a time when the subject of narcotics was discussed?
A Not in my presence, no, sir.
Q You never talked about narcotics with him at that time?
A No, sir.
[fol. 393] Q Did Detective Bermudez ever ask you to go buy narcotics for him?
A Yes, sir.
Q Was it at that time?
A No, sir.
Q Was it on that day?
A It was on that day, not that time.
Q And did there come a time when you left the Three-Fours?
A Yes, sir.
Q And about when was that?
A Oh, about 7:00.
Q And did you have another conversation with him at sometime after that?
A No, sir, not as I can recall.
Q Well—
MR. FACELLE: I'm sorry, I didn't hear the answer, Your Honor.
A No, sir.
THE COURT: Not that he can recall.
MR. FACELLE: Thank you.
Q Now, you testified that you had a conversation with him?
A Yes, sir.

Q About narcotics, sometime on the 4th of January?
A Yes, sir.
[fol. 394] Q Now, about what time was that?
A Approximately, maybe 6:00, 6:30, somewhere along there.
Q And where were you at that time?
A Three-Fours Bar and Grill.
Q And what did he say and what did you say?
A Well, he wanted me to go and see could I obtain a bag of drugs for him. I told him that it was a panic on, that I wanted drugs for myself and could no drugs be found nowhere because I was drinking Robitussin A. C.
Q What is that?
A It's cough syrup with codeine in it.
Q Let me stop just a moment and go back. Were you using narcotics at that time?
A I was.
Q Now, for how long had you been using narcotics, when did you first begin?
MR. FACELLE: Objection, Your Honor, as to materiality.
THE COURT: No, I will allow it.
A You mean how many years or—
Q Yes, when did you first begin using narcotics?
A Oh, I say about 1961.
Q That was in North Carolina?
A North Carolina.
[fol. 395] Q And did you subsequently, did you after that time become addicted to narcotics?
A I have, quite a few times.
Q You say quite a few times. Were there any times between the time that you began using narcotics and January of this year, that you were not addicted?
A I started around about June, you know, just taking a shot, maybe on the weekend, and it built up to around about to the middle of December, I had a habit.
Q That's December of 1965?
A Yes, sir.
Q All right. Let's go back to the Three-Fours, the 4th of January of this year.
A All right.

Q Now, you said that, I believe, that he had asked you to go obtain drugs for him?

A He did.

Q And what did you say to that?

A That it was a panic on, that I was trying to get drugs for myself and that couldn't be done.

Q And what happened after that?

A Well, he kept asking me, asking, asking, and I kept telling him we couldn't buy no drugs because it was a panic on, it wasn't no drugs to be found, because I needed them for myself.

[fol. 396] Q And what happened after that?

A Well, just a little more small talk and I left.

Q I'm sorry, you'll have to speak up a little louder.

A A little more small talk and things, and things like that, and he bought me a beer, and I left and went to the Red Rose Bar up on Huguenot Street.

Q And did you ever buy drugs for him?

A No, sir.

Q You say that you had seen Detective Bermudez before the 4th of January, is that right?

A I have.

Q And who was it that introduced you to him?

A No one introduced me to him, I had just saw him. He had never been introduced to me, but he was in his car with Ronnie Sykes and I believe Detective Parks was in the car, too, I'm not sure, because this was about in the middle of December.

Q And what happened at that point?

A Well, it was, as I can recall, it was Al Payne which was Alvin Mills, and Ambrose Rooney, and I was, you know, scrape up enough money to buy one bag of heroine for three of us, and he went, he come around the corner on Sickles Avenue, he asked Ronnie to ask one of us to see could we cop a bag of drugs for him. Cop means to guy a bag of drugs for him, which one of the boys did so.

[fol. 397] MR. FACELLE: If Your Honor please, may we have a time or date, approximate date established?

THE COURT: Yes, I think you can fix it, Mr. Projansky.

Q When did this occur?
A It was round about in the middle of December. The date I'm not sure.
Q What time of day?
A It was mostly, it was at night.
Q Yes, go on, what happened?
A Well, he gave Ronnie Sykes the money to give to, I believe it was—Ambrose Rooney. And so when we went to this here—
Q Excuse me just a moment, where was Detective Bermudez at the time?
A He was in his car.
Q And where was Ronnie Sykes?
A In the car.
Q And where was Ambrose Rooney?
A Ambrose Rooney, Alvin Mills and I was standing on the sidewalk.
Q Would you speak up a little louder?
A Ambrose Rooney, Ambrose Rooney,—
Q Yes.
A Ambrose and Alvin Mills and I were standing on [fol. 398] the sidewalk. Mr. Bermudez and Detective Parks and Ronnie Sykes was in the car.
Q Yes. And what happened after he gave Ronnie Sykes the money?
A He handed it to—I can not remember this good, but I believe it was Ambrose Rooney, I believe it was Ambrose Rooney.
Q Yes, and what happened next?
A To obtain a bag of drugs for him. He handed him seven dollars, and so we went in—
MR. FACELLE: If Your Honor please, at this time I'm going to object to this line of questioning as having no relevancy or materiality on the issue here before the Court.
THE COURT: I will allow it, Mr. Facelle.
A (Continuing) He handed him the money which we—he handed him the seven dollars, to obtain the drugs for him, and which we had seven dollars to obtain the bag of drugs for us. So we went into—we rung the bell. The boy comes to the door, he said he have respectable peoples living there.

Q Who said this?
A This was the Spanish boy. We called him Joe.
Q What house was this?
A It was on Stickles Avenue.
Q Do you know the number?
[fol. 399] A I believe it was 108 Sickles.
Q And where did this take place, at the front door?
A This time he say he have respectable peoples living there and if we come in, you know, we didn't want to walk around, not to disturb, not to make too much noise.
Q Yes, and what happened then?
A So since it was three of us getting out on one bag, the bag that we had, you know, bought for Mr. Bermudez, we decided to just take some of the powder, the heroin out of his bag and put in our bag so it would be more for us and less for him.
Q And what happened then?
A We come back out, we come out of the house, he asked, "Did you get it? Did you get it?" and he handed the bag to Ronnie Sykes.
Q Who handed the bags to Ronnie Sykes?
A I believe it was Rooney, Ambrose Rooney who handed the bag to Ronnie Sykes, which Ronnie Sykes handed it to Joe, which they called Detective Bermudez.
Q And what happened then?
A And then they drove off and we went and use it, used the drugs that we had.
Q Now, after the 4th of January, did you ever have another conversation with Detective Bermudez?
A I did.
[fol. 400] Q And when was that?
A The Three-Fours Bar and Grill.
Q And when was that?
A On a Thursday, I believe it was. I'm not quite sure of the day; I believe it was on a Thursday.
MR. PROJANSKY: Your Honor, may we take judicial notice that the sixth of January was a Thursday.
THE COURT: No, you may ask the witness whether this might be such a date.
Q Let me ask you this, Viven, you were arrested in the month of January, were you not?

A I was.
Q Do you remember the date?
A Yes, sir. It was the 7th of January.
Q And what day of the week was that, do you recall?
A It was Friday.
Q And then the day before that—
A It was—
Q It would be a Thursday, is that right?
A That's right, that's right; that's correct.
Q Now, how many days after the 4th of January was it before you saw Detective Bermudez again.
A Oh, it was on the 6th, as you say.
Q Now, you say that you met him in the Three-Fours?
[fol. 401] A Yes, sir.
Q About what time of day was that?
A It was in the afternoon, around about, well I cannot say exact time because—
Q As best as you can recall?
A The best I can recall, it was about 7:30.
Q In the early evening?
A In the early evening.
Q And who else was present? That is if anyone, besides yourself and Bermudez?
A You see, usually we be talking to Charlie Burkes, was Charlie Burkes was working as a waitress—a waiter.
Q And was he present at that time?
A He was.
Q And was anyone else there?
A Detective Parks was present but he was not talking to—he was not with Detective Bermudez and Charlies Burkes at that time.
Q And where in the Three-Fours did you meet Detective Bermudez?
A It was mostly—
Q At that time?
A At the back, mostly at the back, close—you see, it's two sections in the Three-Fours. One section of the Three-Fours is where at the bar where you can drink.

[fol. 402] In the back of the Three-Fours they have tables where you can sit down, drink, and dance and have a band.

Q And do you recall the substance of the conversation that you had with Detective Bermudez?

A I do.

Q And what was the substance of that conversation?

A He wanted drugs.

Q What did he say about drugs?

A First he wanted me to see could I cop him a half-a-load of drugs? A half-a-load which is equal to fifteen tray bags, fifteen three dollar bags.

Q And what did you say to him?

A I told him it was a panic on, you couldn't buy no drugs.

Q And what happened then?

A Well, he said, "Could you buy me two bags of drugs?"

Q And what happened then?

A I told him still there is a panic on.

Q And what happened after that?

A Well, one thing, this when my—a friend of mine come in the bar.

Q Who was that?

A Henry Stanley.

Q Stanley?

A Henry Stanley.

Q And then what happened?

[fol. 403] A Well, he come up and he start talking, Bermudez, Mr. Bermudez, Detective Bermudez turned around and asked him. "You understand, you a friend of Viven?" and told him he was. He said, "Well, birds of a feather flock together. You know where you can get some drugs at?" and Henry told him the same thing, it's a panic on, that we was drinking terpin hydrate and robitussin A. C.

Q Cough medicine?

A Cough medicine.

Q What happened then?

A Well, he kept asking him, kept asking him and insisting, so Henry punch me in the side.

Q He what?
A Punch me.
Q What do you mean by that?
A To call me to the side.
Q Yes.
A Wanted to talk to me. So—
Q Did you have a conversation with him?
A I did.
Q And what was that conversation?
MR. FACELLE: Objection, Your Honor.
THE COURT: I will sustain the objection, Mr. Projansky. It's out of the—
[fol. 404] MR. PROJANSKY: Your Honor, I believe this goes directly to the state of mind of the witness at that time.
THE COURT: No, I will sustain the objection, not in the presence of any parties here.
Q You had a conversation with Henry Stanley at that time, is that right?
A Yes, sir.
Q And that time—as a result of that conversation, did you decide to do something?
MR. FACELLE: Objection, Your Honor, to the form of the question.
THE COURT: Not what you decided to do, did he do anything as a result of the conversation.
MR. PROJANSKY: Your Honor, as with—
THE COURT: You are describing a mental operation of the witness, Mr. Projansky. You may ask the witness as a result of this conversation, if he did anything.
MR. PROJANSKY: Excuse me, Your Honor. If I may be heard on this point, the indictment states that the alleged crime herein was committed wilfully and feloniously and I believe the state of mind of the defendant is always a key issue as to those allegations.
THE COURT: Yes, I have already ruled on the objection. I will again repeat, I will sustain the objection, [fol. 405] but you may ask the witness to state what he did as a result of this conversation.

Q As a result of that conversation, with Henry Stanley, what did you do, if anything?
A We beat it.
Q What do you mean by that?
A We gave him baking powder instead of heroine.
Q After you had that conversation with Henry Stanley, did you leave the bar?
A Yes, sir, we did.
Q And where did you go?
A To Henry's house.
Q And what did you do there?
A That's where we were going to try—
MR. FACELLE: Objection, Your Honor.
THE COURT: I will let him describe this, what he did.
MR. FACELLE: He said that's why we tried—and that's what I'm objecting to.
THE COURT: That's where. That's where.

(Whereupon the testimony referred to was read back by the court reporter.)

Q Speak up now so everyone can hear.
A We, Bermudez, Detective Bermudez has been de-
[fol. 406] posing himself as a snorter.
Q Yes.
A We know if he's a snorter, if he snorts something—
MR. FACELLE: Objection, Your Honor, as to what they know.
THE COURT: No, I will allow it.
A If they know they snort something and it doesn't have a sting to it, then it's not heroine, but if you snort something that has a sting to it, he doesn't he been beat until about maybe fifteen or twenty minutes later. So first we tried a baby formula which mixed—mixed with milk, we tried that but it didn't have the sting.
Q That's some powdered substance?
A Powdered substance, white powdered substance. Then we tried baking powder.
Q Excuse me, when you say you tried, what do you mean you tried?
A We snorted it.

Q That's drew it up into your nostrils?
A That's right.
Q You say it didn't have a sting?
A Didn't have a sting.
Q So what did you do then?
A Well, we tried baking powder.
[fol. 407] Q Yes.
A Well, that had just the right amount of sting, so he had two glassine envelopes which he had previous used—which he had previous, you know, had use the heroine from.
Q Yes?
A So we put them in that and taking it back to the Three-Fours.
MR. FACELLE: May we establish, Your Honor, who did this?
THE COURT: He and his friend went to a house and they took some baking powder and put it in two glassine envelopes and went back to the Three-Fours Club, is this your testimony?
THE WITNESS: Yes, sir.
THE COURT: That's what I thought.

DIRECT EXAMINATION CONTINUING BY MR. PROJANSKY

Q What happened then?
A We gave it to him.
Q To whom?
A To Bermudez.
Q When you—was that inside the Three-Fours?
A Yes, sir.
Q Did you have any conversation with him at that time?
A No, sir. I was kind of sick and since I had—
MR. FACELLE: Objection, Your Honor.
[fol. 408] THE COURT: Yes. Beyond that said he had no—
THE WITNESS: Well—
THE COURT: They had no conversation with him.
Q Did you say anything to him at all?

A No more, you understand, that, you know, we didn't want the man to think—

THE COURT: No, Mr. Harris, did you have any conversation when you went back?

THE WITNESS: I did.

THE COURT: You did?

THE WITNESS: I did.

THE COURT: This is what Mr. Projansky asked you, what you said and what did he say.

THE WITNESS: Well, first we asked him to buy a beer.

Q Yes?

A You understand, we asked to buy a beer. We did not want the man to know that—

MR. FACELLE: Objection, Your Honor, as to what they wanted the man to do.

THE COURT: I will allow it.

A (continuing) He bought us the beer.

Q Yes, and did you have any conversation with him at that time?

A We did.

[fol. 409] Q Did you talk about the drugs?

A Well, I told him, you understand, that the drugs that we would give him, you understand, was the best we could do and might be a little light.

Q What do you mean by a little light?

A Might not give him the full effect.

Q And was there—did you put any heroine in these envelopes?

A No, sir.

Q Were they emptied before you put the baking powder in?

A Yes, sir.

Q And after you had that conversation, what happened?

A Well, he bought us the beer.

Q Yes?

A And so, well, since I was sick, Henry was sick, we had a few dollars, about four dollars between us, we were going to go downtown and try to buy ourselves some drugs then, since we had his money.

Q Did he pay you for those drugs?
A He paid twelve dollars.
Q And did you go to New York?
A We did.
Q When was the next time that you saw Detective Bermudez?
A The next day I was arrested.
[fol. 410] Q Did you ever sell Detective Bermudez any drugs?
A No, sir.
Q Did you ever sell anyone any drugs?
A No, sir.
Q Have you ever been in the business of selling drugs?
A No, sir.
Q Have you ever had a partnership, a business arrangement—
A No, sir.
Q —with Al Payne?
A No, sir.
Q With Wayne Baker?
A No, sir.
Q With Benny Lawson?
A No, sir.
Q Now, you stated that you started using drugs around 1961?
A Yes, sir.
Q Have you ever given drugs to anyone?
A I have.
Q Did you give drugs to anyone on the 4th of January?
A No, sir.
Q Did you give drugs to anyone on the 6th?
A No, sir.
Q Now, what kind of physical condition are you in at this time?
[fol. 411] THE COURT: Sustain an objection.
MR. FACELLE: Thank you, Your Honor.
MR. PROJANSKY: Excuse me, Your Honor, I believe the defendant's demeanor is always in evidence, if he can explain it then I believe—

THE COURT: No.

MR. PROJANSKY: —he's entitled to it.

THE COURT: No, please. I will sustain an objection.

Q Before the 4th of January, had anyone ever told you anything about the man that you knew as Joe?

MR. FACELLE: Objection, Your Honor.

THE COURT: He may answer yes or no.

A Yes.

Q And do you remember what that was?

A I cannot recall the date, no, sir.

Q Was it in the month of December?

A Yes, sir.

Q Was it before or after Christmas?

A Before.

Q And who told you anything about Joe?

THE COURT: I will sustain the objection.

MR. PROJANSKY: I didn't hear an objection, Your Honor. I want to know what the grounds—

MR. FACELLE: Objection, Your Honor.

THE COURT: On the grounds that the question is irrelevant and immaterial.

[fol. 412] Q You stated that you had heard that Detective Bermudez was a snorter?

A Yes, sir.

Q And who told you that?

MR. FACELLE: Objection, Your Honor.

THE COURT: Yes, I will sustain the objection.

MR. PROJANSKY: Your Honor, that's certainly material, it seems to me.

THE COURT: No, it isn't.

Q At that time, the 4th of January, did you know then that it was a crime to sell drugs?

A Yes, sir.

Q But you didn't know Detective Bermudez, did you?

A Not personally.

Q Were you suspicious of Detective Bermudez?

THE COURT: I'm sorry, I didn't hear, Mr. Projansky.

(The question was read back by the court reporter.)

MR. FACELLE: Objection, Your Honor.
THE COURT: I will sustain an objection to it, sir.
Q Were you addicted to drugs at that time?
A I was.
Q Had you ever discussed drugs with strangers?
A No, sir.
[fol. 413] Q Now, on the 4th of January, did you have a conversation—with John? Did anyone ever tell you that Detective Bermudez had used drugs?
MR. FACELLE: Objection.
THE COURT: I will sustain the objection.
MR. PROJANSKY: Your Honor, I submit that, throughout, the state of mind of the defendant is very much in issue.
THE COURT: No.
MR. PROJANSKY: It's something I believe the jury is entitled to—
THE COURT: The jury will determine the state of mind of the defendant. He has already testified as to the transactions which he says, if in fact they occurred, did occur. It will be the jury that will determine what transpired on January 4th and January 6th. What he thought on January 8th of December 25th, in this Court's opinion, is utterly irrelevant and I will sustain an objection to that line of questioning.
MR. PROJANSKY: Your Honor—
THE COURT: It is going to be what the defendant intended to do, if in fact he intended to do anything, on January 4th and on January 6th.
MR. PROJANSKY: I'm not speaking in regard to intent, Your Honor.
[fol. 414] THE COURT: Then the defendant's state of mind does not become relevant in this type of a case, sir.
MR. PROJANSKY: I have no further questions, Your Honor.

CROSS EXAMINATION BY MR. FACELLE

Q Mr. Harris, in December of '65 or January of '66, were you employed?
A Up to around December 3rd, I believe.

Q You were employed up to December 3rd?
A I believe so.
Q And you were not from December 3rd until January 7th?
A The 7th of January? I don't think so.
Q Were you or weren't you?
A No, I wasn't.
Q Were you living with your wife and your child at the time?
A I was.
Q Where were you living?
A 149 Guion.
Q The City of New Rochelle, is that right?
A That's right.
Q And prior to December 3rd, where were you employed?
A Fred Magneri Landscaping Gardner.
Q Now, this weapon that you say you were convicted [fol. 415] of possessing, what was the date that you possessed that weapon to which you pleaded guilty in New Rochelle?
A I cannot recall the date.
Q Would it refresh your recollection, Mr. Harris, if I mentioned to you the date of December 11th, 1965? Would that refresh your recollection?
A Is that the date I was convicted?
Q Not the date that you were convicted, the date that you admitted that you possessed this weapon.
A I admitted possession of weapon when I pleaded guilty to a case.
Q Did you plead guilty to possessing a weapon on December 11th, 1965? Not that you pleaded on that date, but that you possessed the weapon on that date?
A I did possess a weapon on that date.
Q And what type of a weapon was that?
A A knife.
Q And is it not a fact, Mr. Harris, that with that knife you stabbed one Gus Fowler in your apartment?
A I cut Gus Fowler, that's right.
Q And is it not a fact that that stabbing of Gus Fowler was in a dispute over drugs?

A No, sir.
Q It was not?
A No, sir.
[fol. 416] Q Where did you stab him?
A In my house.
Q Where did you stab Gus Fowler, what part of his body?
A I did not stab him, I cut him.
Q Where did you cut him?
A Across the chest.
Q Part of the chest?
A Part of the chest.
Q And is it not a fact that you broke the blade of the knife in the cutting?
MR. PROJANSKY: I'm going to object, Your Honor. The defendant's already admitted the act.
THE WITNESS: Can I ask a question?
MR. PROJANSKY: And I believe that since the details of that act certainly are not in issue here, and since the defendant has admitted that the District Attorney—
THE COURT: Does the law permit on cross examination interrogation as to the circumstances as to the crime?
MR. PROJANSKY: I don't believe so, Your Honor. He's already admitted.
THE COURT: Well, I think—excuse me, I will overrule your objection.
MR. PROJANSKY: May we have a limiting instruction.
[fol. 417] THE COURT: You may continue, Mr. Facelle, and you may have an exception, Mr. Projansky.
MR. PROJANSKY: May we have a limited instruction as to this type of testimony?
THE COURT: The cross-examiner is never restricted to the mere admission of the commission of the crime. He may, at his option, go into the details thereon, so I will overrule your objection, sir.
MR. PROJANSKY: May we have an instruction to the jury, as for what purposes they may consider this evidence?

THE COURT: You interrogated the jury, the jury understands that this goes to the credibility of the witness, and not as to evidence of guilt of the commission of this crime. It simply goes to the issue of the witness' credibility and I am sure the jury understands that now.

CROSS EXAMINATION CONTINUING BY MR. FACELLE:

Q Mr. Harris, I believe you said that the first time that you spoke to the Detective Bermudez was on the 4th of January, is that correct?

A That's right.

Q In the Three-Fours?

A Three-Fours.

Q And Charlie Burkes and Ronnie Sykes were present?

[fol. 418] A That's right.

Q Did anybody introduce you to Detective Bermudez?

A Charlie Burkes.

Q He introduced you?

A Introduced me.

Q Did you not have a conversation with Detective Bermudez at that time about a guitar?

A No, sir.

Q No conversation whatsoever?

A No conversation whatsoever.

Q Did you sell a guitar to Detective Bermudez?

A No, sir.

THE COURT: I'm sorry, I didn't hear the answer.

A No, sir.

Q Did you, Mr. Harris, steal a Kent guitar in a carrying case with a blue and white tag with a number WTG, 67066, from Grant's in the City of New Rochelle?

A No, sir.

Q Did you sell a guitar for $25.00 to Detective Bermudez on the 4th of January?

A No, sir.

Q At any time, Mr. Harris, was Detective Bermudez ever in your apartment?

A No, sir.

Q At any time did Detective Bermudez ever meet your wife?

[fol. 419] A No, sir.

Q At any time did you ever have any conversations with Charlie Burkes and Detective Bermudez about buying a guitar which was hot?

A No, sir.

Q Do you understand what I mean by hot, Mr. Harris?

A I understand what you mean by hot.

Q What was the first time you had a conversation, discussion with Detective Bermudez about drugs?

A Drugs. The 4th of January.

Q And what was that discussion, again?

A He wanted me to purchase some drugs for him, which I told him that I could not because it was a panic on.

Q Well, had you told Detective Bermudez that you were a user of drugs?

A Had I ever told him that I used—

Q At that point, before he asked you to buy drugs for him, had you ever told Detective Bermudez that you used drugs.

A No, sir.

Q Did he ever see you use drugs?

A No, sir.

Q Up to that point? And I believe you testified on Direct that you never discussed drugs with strangers, is that right?

A That's right.

Q So that Detective Bermudez, then, not knowing [fol. 420] that you ever were a user of drugs—

A That's right.

MR. PROJANSKY: Objection, Your Honor, that's not what the witness said. He said that he didn't tell him that.

Q You never told him you used drugs? You never used drugs in his presence?

A That's right.

Q Asked you to buy drugs for him?

A That's right.

Q And you say there was a panic on?
A That's right.
Q That you couldn't any?
A I didn't say I didn't use it, I said it was a panic on and that I needed drugs, but it was a panic on, you could not get no drugs.
Q Did you tell him that you couldn't even get drugs for yourself?
A That's right.
Q So that on the 4th day of January, 1966, Mr. Harris, did you sell anything to Detective Bermudez?
A No, sir.
Q On the 4th day of January you didn't even make up this bag of baking soda or whatever it was that you concocted on the 6th?
[fol. 421] A No, sir.
Q You passed absolutely nothing to this Detective for which you received any money?
A Nothing.
Q Now Mr. Harris, referring to People's Exhibit 2, just the little glassine bag, not the brown tapes, did you ever see that before you appeared in court?
A I have saw bags similar to these.
Q That bag?
A I've saw you all handle this in court.
Q Listen to my question. Did you ever see that bag, that one?
A Before coming to Court?
Q That's right.
A No, sir.
Q And of course you did not sell that bag to Detective Bermudez?
A That's right.
Q You didn't sell anything to him or you didn't give anything to him?
A That's right.
Q You gave him the narcotics?
A That's right.
Q You have him no bag that contained any substance that even looked like narcotics?

[fol. 422] Q Did you have any conversation with him relative to half-loads at that time?

A I was—he wanted to buy a half-load. You cannot buy half-loads—

Q Please answer my question. Did you have any conversation with him at that time about half-loads?

MR. PROJANSKY: He's answered that, Your Honor. He's given the substance of the conversation.

THE COURT: You may answer the question, Mr. Harris.

A Hee wanted to buy half-loads. He wanted us to go to New York and buy him half-loads. It was no half-loads, it was no dope, or nothing present. It was a panic on.

Q Because of the panic. I see. And you told him you couldn't do it?

A Couldn't do it.

Q Did you have any further conversation with him on that day about narcotics?

A No, sir.

Q By the way, did you ever personally see Detective Bermudez or Detective Parks snort drugs?

A Not I, myself, no, sir.

Q Or snorting what would appear to be drugs?

A No, sir, I didn't.

Q You do know Al Payne, do you not?

[fol. 423] A I do.

Q What's his real name, true name?

A Alvin Mills, I believe.

Q Pardon?

A I believe it's Alvin Mills, I'm not for sure.

Q Did you see Al Payne or Alvin Mills on the night of January 4th, 1966?

A No, sir.

Q Did you stop around to the pool room that night?

A No, sir, I was at the Red Rose.

Q You were at the Red Rose. But you didn't see Al Payne at the pool room at all that night?

A No, sir.

Q You're quite sure?

A I'm—I'm quite sure.

Q How long have you known Al Payne?
A Oh, about two years.
Q How long have you known Ambrose Rooney?
A About a year and a half.
Q How long have you known Wayne Baker?
A Same, about a year and a half, two years maybe.
Q How long have you known Ronnie Sykes?
A About a year.
Q By the way, this address to which you made reference, 108 Sickles Avenues, about the transaction with [fol. 424] Ambrose Rooney, et cetera, you say that took place in front of 108 Sickles Avenue?
A It did.
Q Do you know any people that live at 108 Sickles Avenue?
A I didn't know one personally who lived there.
Q Mr. Harris, do you know Benny Lawson?
A I know Benny Lawson.
Q Yes. Do you know where Benny Lawson lives?
A I know he stay on Sickle Avenue, but I don't know if it's 108 or not?
Q You've never been in his apartment?
A No, sir.
Q Now, after the 4th of January, you say you didn't have any other conversations with Detective Bermudez until the night of January the 6th, is that right?
A That's right.
Q And that was a Thursday night. Where did you meet him?
A Three-Fours Bar and Grill.
Q Tell us about the conversation again.
A Well, it was small talk at first, and—understand? So Charlie Burkes and I was there. He wanted to purchase two bags of heroine.
Q First he wanted to buy a half-load, right, on the night of the 6th. Isn't that what you testified to on direct?
A He wanted two bags of heroine.
[fol. 425] Q Let me ask you this, Mr. Harris. Didn't he first ask you again on the night of the 6th to purchase a half-load for him and then settle for two bags?

A He might have.
Q Well, did you tell this Court on direct that you had conversation about a half-a-load on the night of the 6th?
A Mostly everytime I saw Mr. Bermudez he wanted as half-a-load.
Q You only saw him twice?
A That's right.
Q Before his arrest?
A Not twice, correction, three times.
Q You had conversations with him twice?
A Twice, that's right.
Q And you say the first time he discussed a half-load with you and on the 6th he discussed a half-a-load also?
A That's right.
Q But you say you couldn't get it, there was a panic on?
A Panic on.
Q And tell us about the rest of the conversation.
A Well, since it was a panic on and everything, we was talking, he was begging for the drugs; he had a way of convincing peoples—
Q Not—please tell us what the conversation was.
[fol. 426] A The conversation was relative to drugs. It was small talk about drugs. That's when Henry Stanley come in.
Q By the way, who—where does Henry Stanley live?
A At the present, I do not know.
Q Well, did you know where he lived on January 7th, 1966?
A If you—I mean I know the house, but you get a map I can point out the street to you.
Q Well—
A But I do not know the street.
Q Not to me, Mr. Harris, do you know where he lives?
A I know where he lives.
Q Do you know where he lives today?
A I do not.
Q Did you know where he lived on January 7th, 1966?

A I did.
Q Do you know where he works?
A I do not think he was working.
Q Pardon?
A I do not think that he was working at the time.
Q By the way, do you know the name of the street that he lives on?
A No, sir, I do not know the name of the street.
[fol. 427] That's what I say, if you get me a map, I will point out the street; map of New Rochelle, I will show you the street.
Q He lives in the City of New Rochelle?
A He do.
Q You don't know where he works?
A No.
Q Is he married?
A Yes, he is.
Q How old is he?
A I say round about 25, 27.
Q How tall is he?
A Maybe about six, six and a half, six-one. Maybe about six, six and a half or six-one.
Q All right. And what else can you tell us about him?
A Only thing I can tell you about it, that he's a hustler, he uses drugs, he's a pool shark, he's a hustler.
Q How long had you known him?
A Henry?
Q Yes.
A Mostly ever since I come to New Rochelle.
Q How long is that?
A I come to New Rochelle in '62.
Q And Henry was present when all these conversations took place on the night of the 6th, is that right?
A Not when all the conversations took place, no, he was not present.
[fol. 428] Q Was he present when you had a conversation about a half-load?
A No, he was not.
Q Did you have a—when he present when you had the conversation with Bermudez about scoring the two bags?

MR. PROJANSKY: Objection, Your Honor. The witness didn't say anything about scoring two bags, Your Honor.

Q By purchasing the two bags?

A He come in, at the time that Mr. Bermudez was begging for someone to buy drugs for him. Buy it, I mean purchase drugs for him.

Q He came in and was present when Bermudez—

A He was asking this, he comes up to me, he knows me, and he knows Charlie, and he was usually be around the Three-Fours all the time.

Q Well, did he hang out at the Three-Fours, Stanley?

A Most of the time.

Q Was he around the Three-Fours almost every night?

A I wouldn't say because I was around the Three-Fours every night.

Q Well, would you usually see him in the Three-Fours when you were there?

MR. PROJANSKY: Objection, Your Honor, what he usually saw is immaterial.

[fol. 429] THE COURT: No, I will allow it on cross-examination, but reaching a point of irrelevancy, Mr. Facelle.

MR. FACELLE: If Your Honor please, may I be permitted to pursue this on the question of relevancy as to the location of this individual?

THE COURT: No, you have already explored that. Let's give him a map. He can show you where he lives.

MR. FACELLE: Referring to Defendant's E for identification.

Q Mr. Harris, do you recognize that as a map of the City of New Rochelle?

A Yes, sir, I do.

Q Can you please point out to us the street on which this Henry Stanley lives?

A As soon as I can find Guion Place.

Q Pardon?

A As soon as I can find Guion Place.

THE COURT: While the witness is looking, Mr. Foreman, we will take a recess at this time for five min-

utes. Please don't discuss this case nor form an opinion on it. We will take a recess of five minutes.

(Recess declared at 3:15 p.m.)

(Resuming at 3:43 p.m. The jury is present in the courtroom. The defendant and both counsel are present.)

[fol. 430] THE COURT: You were interrogating the witness to whom the map was given, Mr. Facelle.

MR. FACELLE: Yes.

(The witness defendant Viven Harris having been previously duly sworn, resumed the witness stand and testified further as follows:)

CROSS EXAMINATION CONTINUING
BY MR. FACELLE

Q Have you been able to locate the street that This Henry Stanley lives on?

A I have.

Q May we have it please? What's the name? Without marking the map, would you just tell us?

A Prior Street—Prince.

Q Prince Street?

A Prince Street.

Q Between what avenues, on what streets?

A That's between Lincoln and Sickles.

Q And what street?

A Sickles Avenue.

Q Sickles Avenue?

A That's right.

Q And on what side of the street does he live? Can you give us any landmarks, any buildings or places of business on the street that you can identify?

[fol. 431] A Well, it was a house he was living in, just been freshly moved there, it wasn't built, it was just moved there.

Q Is it a private house or an apartment?

A It's apartment.

Q An apartment house?

A It is.

Q How many apartments?
A I really couldn't say.
Q Pardon?
A I do not know.
Q Well, can you estimate?
MR. PROJANSKY: Your Honor, this is all immaterial, I think.
THE COURT: Yes, I will sustain it. I think we have explored it far enough.
MR. FACELLE: If Your Honor please, may I approach the bench with counsel? I'd rather not have the argument in the presence of the jury.
THE COURT: You don't even need to come up. I feel that it has gone far enough, Mr. Facelle, I will sustain the objection.
Q What was the color of the house?
A White.
Q Do you know the address?
[fol. 432] A No.
Q How many stories?
A I think it was two.
Q In the middle of the block or near a corner?
MR. PROJANSKY: Your Honor, I'll make the same objection.
THE COURT: Yes. I did sustain Mr. Projansky's objection a bit ago, and you are now pursuing it.
MR. FACELLE: If Your Honor please—
THE COURT: I'll sustain—
MR. FACELLE: I feel this is most material that we be able to try to locate—
THE COURT: I'll sustain—I will sustain the objection.
Q Have you seen Henry Stanley since January 7th, 1966?
A No, sir.
Q Now, after this conversaton you had relative to narcotics, with Detective Bermudez and Henry Stanley and Detective Bermudez said he wanted two bags, is that correct?
A That is correct?
Q And you had a conversation with Stanley after that?

A I did.

Q Where did you go?

A Well, we still in the Three-Fours. We just stepped about from Mr.—Detective Bermudez, a few feet away [fol. 433] from Detective Bermudez so he wouldn't overhear what we was talking about.

Q And how long did you talk privately with Henry Stanley?

A Oh, approximately two or three minutes.

Q And then where did you go?

A Start back to talk to Mr. Bermudez.

Q And what conversation did you have with him then?

A We told him that we might, you know, be able to come up with something.

Q How much?

A He wanted two bags.

Q So after all this conversation you had about the panic and you couldn't even get junk yourself, you came back and told him you might be able to do something for him. What did Bermudez say?

A Well, he act like he was kind of skeptical—

Q Now, how did he act, what did he say?

A First act like he was kind of skeptical and then he said okay.

Q And then what did you and Stanley say and/or do?

A We proceeded to Stanley's house.

Q Well, let's just take it step by step, Mr. Harris. You left the Three-Fours Bar and Grill.

A That's right.

Q Did you turn to the right or to the left?

[fol. 434] A We turned to the—come out of Three-Fours, it's on the corner, you turn to the left.

Q You walk to the corner of Sickles?

A Walked to the corner of Guion.

Q Guion and North, is that right?

A Guion and Lincoln.

Q All right. Let's take it from the beginning again, Mr. Harris, please. When you leave the Three-Fours, you were on North Street, is that correct?

A When you leave the Three-Fours, you're on North Avenue.

Q You say you went to the left and you walked to the corner?

A Come out of the Three-Fours, went to the left, made a right turn, that's Lincoln Avenue.

Q All right. You made a right turn at Lincoln and North, right?

A That's right.

Q All right, and then where did you walk to?

A Walked down to Guion.

Q Which is the block that you live on.?

A That was a block that I lived on?.

Q And then when you reached Lincoln and Guion, which way did you turn?

A We turn up—what's the name of the street, Rochelle Place—Remington.

[fol. 435] Q Make a left onto Remmington?

A Right.

Q All right.

A Cross the field, just cut across the field, across the field.

Q Yes, go ahead.

A Open fields. And you right there at his house, where he was standing.

Q Right there at Prince Street, is that right?

A Prince Street.

Q At his house?

A At his house.

Q And you went—where did you go when you arrived at his house?

A To his apartment. His apartment.

Q What floor was it on?

A Second.

Q Was anybody home?

A Not that I can recall.

Q How many rooms in the apartment?

A Well, I wouldn't—kitchen, bedroom and a bath, three rooms.

Q There was nobody home at the time?

A No, sir.

[fol. 436] Q What did you do in the apartment?

A That's when we proceeded to the—test baby formula and the baking powder thing, we tried to fool him.

Q You take some baby formula you say?a

A Baby formula.

Q And you and Stanley snorted some?

A That's right.

Q And you found that it didn't give the sting, is that right?

A Didn't give the sting.

Q Then you got some baking soda?

A That's right, powder.

Q Baking powder. And you both snorted the baking powder?

A That's right.

Q Did that give you the sting?

A We agreed on that.

Q What did you do with the baking powder?

A Well, he bagged it up.

Q What do you mean by bagged it up?

A He put it in two glassine envelopes.

Q Where did he get the glassine envelopes?

A Which he had previous used the heroine from.

Q What heroine?

A That he had used from.

Q This heroine that he had gotten before the panic [fol. 437] and you couldn't get any drugs you had to use robitussin A.C.?

A He heroine that he had got before the panic and we using robitussin A. C., then the envelopes that he put it in.

Q I see. And tell me, in all the years that you've been using drugs, Mr. Harris, had you ever saved the glassine bags after you used the drugs?

A Well, you don't never—

Q Not—have you ever saved, in all the years you've been using drugs, have you ever saved the glassine bags after you've used the heroine?

A You don't save them, you just leave them around, they had by laying around.

Q Did you ever save the bags or even have them laying around after you have used them?
A Yes, I've had them laying around after I've used them.
Q Just the empty bags?
A Just the empty bags laying around.
Q Was there anything in these bags that you placed this baking soda, this baking powder?
A No, sir.
Q Just plain empty bags?
A Plain, empty bags.
Q Mr. Harris, I ask you to take a look at People's Exhibit 3, just the two glassine bags, and I ask you, Mr. Harris, are these the glassine bags that you sold to De-
[fol. 438] tective Bermudez for twelve dollars?
A No, sir.
Q They are not?
A No, sir.
Q Positive?
A Positive.
Q How long did it take you to test this baby formula? The baking powder, bag it, snort, et cetera?
A Maybe fifteen, maybe twenty minutes, something like that?
Q And then what did you do?
A As I said, he proceeded to bag it up in two glassine envelopes.
Q And then you left?
A We left.
Q And where did you go?
A To the Three-Fours.
Q And you met Detective Bermudez again?
A We did.
Q Both of you?
A Both of us.
Q You had a conversation with Bermudez?
A We did.
Q All right, tell us about the conversation with Bermudez.
A Well, he asked us did we have the stuff? And so

[fol. 439] we didn't want, you know, seems suspicious, let him know thing that we was beating him or nothing, something like that, you know, so we asked him, "Yes, we got what you want. What about buying some beer?" So he bought us a beer.

Q That's both of you, you and Stanley?

A Bought both of us a beer.

Q Was Stanley present when you had the conversation about, "We have the stuff for you."?

A Stanley present?

Q Yes.

A He was present, yes.

Q He was present?

A He was present.

Q And where did you hand these glassine bags to him?

A I did not hand them to him.

Q Who handed it to him?

A Stanley.

Q Stanley had them all along?

A Stanley had them all along.

Q Where did Stanley hand them?

A In the Three-Fours.

Q At the bar?

A At the bar, you know how you—you make like you're just shaking hands or something, hand it to him. [fol. 440] How many people were in the bar at the time?

A Quite a few.

Q Quite a few, and this is where the pass took place?

A That right.

Q Was that where Detective Bermudez gave you the twelve dollars?

A It was.

Q You didn't go into the car with Detective Bermudez at that time, did you?

A No.

Q Where was Detective Parks?

A It was—see, it's two bars, one on one side to eat, another side you drink. Detective Parks was eating. He had

Q Did you see him?

A I saw him. He had on a black Russian—what you call it, cap or hat or something.

Q And at no time did you get in the car with Detective Bermudez this night?

A No time.

Q At anytime did you ever tell Detective Bermudez that you were out of action for a while but that now—you were back in action?

A No, sir.

Q You know what I mean by action, don't you?

A Yes, sir.

[fol. 441] Q What do I mean?

A By action?

Q Yes.

A That I'm selling drugs, right?

Q Yes.

A Well, I guess that's what you mean by action.

Q At any time did you ever tell Detective Bermudez that you had a partnership with Wayne and with Al Payne, and with—with Wayne and Al Payne?

A No, sir.

Q At any time did you ever ask Detective Bermudez to sell drugs to you in New Jersey?

A No, sir.

Q At any time did you ever tell Detective Parks or Detective Bermudez that you were selling drugs in Connecticut, New Rochelle, New York?

A No, sir. I don't know nothing about Connecticut, never been in my life.

Q By the way, when was it that you testified about going down with Gus Fowler and Rooney to buying the drugs for seven dollars of your own money and seven dollars that Bermudez gave you?

A I didn't testify that I went down with Gus Fowler and Rooney, I said I went down with Ambrose Rooney and Alvin Mills, which they called Al Payne.

[fol. 442] Q I see. You went down with Al Payne?

A That was on Sickles Avenue.

Q To buy drugs?

A That was on Sickles—we met him on Sickles Avenue.

Q And you say that you had seven dollars of your own money?

A We had seven dollars which—between us.

Q And he gave you seven dollars?

A He did not give me seven dollars?

Q Well, a member of his group, is that right?

A He gave a member of the group, he handed seven dollars to Ronnie Sykes, which Ronnie Sykes handed seven dollars to a member of the group.

Q When was this, again?

A Approximately in the middle of December.

Q About the middle of December, a few weeks before this incident of the 4th and the 6th of January, is that right?

A Few weeks before this incident.

Q Few weeks before January 4th and 6th?

A No, it had to be approximately in the middle of December, because right after that I left and went down south.

Q I see. But went down with Al Payne and Ambrose Rooney to buy drugs on that night, didn't you?

MR. PROJANSKY: Objection, Your Honor, he hasn't testified that he went down anywhere.

[fol. 443] THE COURT: I think you ought to let the witness clear it. Did you, Mr. Harris, are you saying that in the middle of December, 1965, you went down with some friends to buy drugs?

THE WITNESS: No. Yes, sir, we went.

THE COURT: You went down.

Q And you purchased drugs, didn't you?

A Well, for ourselves, we did.

Q Pardon?

A For ourselves, we did.

Q Was it a panic on then?

A It was.

Q There was a panic?

A It was a panic in December and January.

Q But you were able to get drugs that night, weren't you?

A We was.

Q You didn't have to use robitussin A. C., did you Mr. Harris?
A Not that night, no, we didn't. That's when drugs went up.
Q I'll ask the questions, please. Mr. Harris, did you ever sell drugs to Charlie Burkes?
A No, sir.
Q Percy Ellis?
[fol. 444] A No, sir.
Q Gus Fowler?
A Benny Lawson?
Q Mr. Harris, what cell block are you in in the jail?
A 2-A-5.
Q Have you ever discussed this case in the jail with Wayne Baker?
MR. PROJANSKY: Objection, Your Honor. That's completely immaterial.
MR. FACELLE: I submit, Your Honor, it's most material.
THE COURT: You may ask him, and he may answer whether he has. The next question I'll pass on, Mr. Projansky.
Q Have you ever discussed this case in the jail with Wayne Baker?
A I have.
Q Did you ever discuss this case in the jail with Luther Harris?
A No, sir, I've never been able to get next to him.
Q Have you or haven't you?
A No, sir.
Q Did you ever discuss this case in the jail with Benny Lawson?
MR. PROJANSKY: Your Honor, I'm going to object [fol. 445] to this entire line.
THE COURT: Yes, now I will sustain it, Mr. Facelle.
A I—
THE COURT: I will sustain the objection. I will sustain it. You are not going to answer, Mr. Harris.
Q Mr. Harris, do you know what skag is?
A It's used as drug, it's drug language.

THE COURT: I'm sorry, I didn't hear the question and I didn't hear the answer. You asked what? You asked what skag—

Q Do you know what skag is, Mr. Harris?

A It's used as drug language.

THE COURT: It's what?

THE WITNESS: It's used as drug language. They use it instead of saying heroine, they say skag.

Q It's the language or the vernacular or the term that's used for heroine, is that right?

A That's right.

Q Mr. Harris, what time were you arrested on the night of the 7th?

A This time, I really does not know.

Q Approximately.

[fol. 446] A 5, 6:00; 6:00, 5:00, I don't know.

Q Where were you taken, Mr. Harris?

A I have it marked on a map.

Q Where were you taken after you were arrested in the City of New Rochelle, where were you taken?

A To—after we was arrested and everything, to your office, we was interrogated.

Q You talked to me, didn't you?

A That's right, you interrogated, you didn't inform us of our rights.

MR. PROJANSKY: Objection, Your Honor, I'm going to object to any introduction at this time of any evidence for any purpose whatsoever of any interrogation which took place in the District Attorney's office, any place else by the District Attorney.

THE COURT: All the question was, Mr. Projansky was did you talk to me and the answer was yes, he did. So this is proper. Now, I will pass on the next question when it comes.

Q Were there other police officers present?

A I couldn't say. You said there was. I couldn't say whether they police officers or what.

Q Do you recall approximately what time it was.

A No, because I was rather—

[fol. 447] Q Do you recall what time?

A No, I do not.

Q Could you estimate whether it was within one hour or two hours after you were arrested?
A I said maybe hour, hour after I was arrested?
Q Pardon?
A Approximately an hour after I was arrested, something like that.
Q And do you recall a man sitting next to you with a machine similar to the one that the court reporter has there?
A I do.
Q And do you recall me asking you certain questions?
A Yes.
Q And you giving me certain answers?
A I do.
Q Do you recall me asking you this question, and you giving me this answer?
MR. FACELLE: Now I'll pause, Your Honor. I'm sure there will be an objection before I even read it.
MR. PROJANSKY: At this time I'd like to render an objection to this entire line of questioning. Mr. Facelle is referring to an interrogation of the defendant while in police custody in January of '66. I think that before Mr. [fol. 448] Facelle makes any reference to any record of such interrogation or anything that was said by the defendant at that time, that he has to lay a foundation and show that it was voluntarily made, under the law, and in conformity with the requirements as set up in the case of Miranda v. Arizona.
THE COURT: Are you going to quote the Kulis Case to me, Mr. Facelle?
MR. FACELLE: A copy of which I have.
THE COURT: In our Court of Appeals.
MR. FACELLE: That's correct, Your Honor, Court of Appeals.
THE COURT: You let Mr. Projansky look at it. I will permit the interrogation Mr. Projansky. If you note the Kulis case, permits it in the Court of Appeals, in this November. I will overrule the objection.
MR. PROJANSKY: Exception, Your Honor.
Q Do you recall me asking you this question and you giving me this answer?

"Question: What did you do Tuesday night with Joe?

Answer: He drove me to get a bag for him and I got it for him."

Q (continuing) Do you recall me asking you that question and you giving me that answer?

A No, I do not.

[fol. 449] Q Do you recall this series of questions and answers:

"Question: All right, in his car?
Answer: In his car.
Question: He wanted a bag of what?
Answer: Skag.
Question: All right, how much?
Answer: A nickel bag."

Q (continuing) Do you recall those questions and those answers?

A I do.

Q Were those questions or the answers that you gave to those questions, withdrawn. Do you recall being asked this question and giving these answers:

"Question: All right, and he drove you someplace?
Answer: He drove me someplace.
Question: Did you tell him where to go?
Answer: No, he knows where to go.
Question: He knows where to go?
Answer: He knows where to go.
Question: You didn't tell him where to go.
Answer: I didn't tell him where to go."

Q (continuing) Do you recall those questions and giving me those answers?

A No, I do not.

[fol. 450] Q Now, those prior questions, when I asked you if you remember the question:

"Question: He wanted a bag of what?
Answer: Skag.
Question: All right, how much?
Answer: A nickel bag."

Q (continuing) You recall those questions and answers?

A I think I do.

Q Were they true when you told them to me, within an hour or so after you were arrested?

A I couldn't say whether they were true or not.

Q You could not say whether they were true or not?

A Because I—, my joints was down and I needed drugs.

MR. FACELLE: If Your Honor please, may we have the witness answer?

THE COURT: No, the witness answered. He said that I can't tell you whether they were true or not. He has answered.

MR. FACELLE: That was the answer.

Q Do you recall being asked this question and giving this answer:

"Question: Did he front the bread? Or did you put it out yourself?

Answer: He had it, he gave me the money."

[fol. 451] A Will you phrase the question, I didn't understand you.

Q Do you recall being asked that question, "Did he front the bread or did you put it out yourself? Answer: He had it, he gave me the money."

A What you mean by front the bread?

Q You don't understand the expression?

A Not front the bread.

Q Do you recall being asked that question and giving the answer, "He had it, he gave me the money."?

A He had what?

THE COURT: All you were asked, Mr. Harris—

THE WITNESS: No, I don't remember the question.

THE COURT: That is the answer, he doesn't know.

THE WITNESS: I don't recall if he asked that question.

Q Do you recall being asked this question and giving these answers:

"Question: All right, how much?

Answer: Five dollars.

Question: How long were you gone?

Answer: About two minutes.
Question: And you gave back with a nickel bag?
Answer: Yes.
Question: Where did you give it to him?"
[fol. 452] "Answer: In his car."

Q (continuing) Do you recall those questions and those answers?
A No, sir, I do not.
Q None of them?
A None of them.
Q Do you recall being asked the question:

"Question: That's all that happened that night?"

MR. FACELLE: And giving the answer:

"Answer: That's all that happened that night.
Question: Now, when is the next time you saw him?
Answer: Last night.
Question: Where?
Answer: Three-Fours."

Q (continuing) Do you recall those series of questions and giving those answers?
A Mr. Facelle, I don't remember giving too many answers.
THE COURT: No, Mr. Harris—
MR. FACELLE: I'll repeat the question.
THE COURT: You are being asked whether you recall these questions being asked of you and you giving these answers.
A No, sir, I don't remember giving the answers.
Q All right. Do you recall this series of questions and [fol. 453] giving these answers:

"Question: Did you talk about skag?
Answer: Uh-huh.
Question: Did he want you to cop for him?
Answer: Yes.
Question: Where did you go, same place?
Answer: Same place. No, out there.

Question: Different place?
Answer: The boy was standing outside the Three-Fours."

Q (continuing) Do you recall those questions and giving those answers?
A No, I do not.
Q Mr. Harris, do you recall being asked this series of questions and giving these answers:

"Question: You went outside?
Answer: I went outside.
Question: And Joe stayed inside?
Answer: Joe stayed inside?
Question: Who was sitting with Joe?
Answer: Eddie.
Question: Anybody else?
Answer: No, Sal was around, Ronnie was around."

Q (continuing) Do you recall those questions and giving those answers?
[fol. 454] A No, sir. I would like to know, who is Sal.
Q I asked you if you recall you giving the answer, "No, Sal was around, Ronnie was around"?
A No, sir.
Q Do you recall that answer?
A No, sir.
Q Do you recall this series of questions and giving these answers:

"Question: What else—or withdrawn.
Question: What did Joe tell you he wanted?
Answer: He said he wanted some skag.
Question: Well, did he tell you, one, two, three half loads, bundle?
Answer: He wanted two."

Q (continuing) Do you recall being asked those questions and giving those answers?
A I do not.
Q Do you recall being asked the following questions and giving the following answers:

"Question: All right, then what happened, you went outside?
Answer: Uh-huh.
Question: And you saw this man?
Answer: Uh-huh."
[fol. 455] "Question: Then you came back?
Answer: Uh-huh.
Question: Did you give him nickel bags?
Answer: Yes."

Q (continuing) Do you recall those questions and giving those answers?
A I do not.
Q Do you recall the following series of questions and giving the following answers?

"Question: How much did he give you?
Answer: He gave me a taste.
Question: How much did he give you?
Answer: I got about a half a bag. He kept a bag and a half himself.
Question: He gave you twelve dollars, didn't he?
Answer: Oh, how much money?
Question: Yes, he gave you twelve bucks plus a taste?
Answer: Yes.
Question: When you say a taste, you mean he gave you part of the bag?
Answer: Yes."

Q (continuing) Do you recall those questions and giving those answers?
[fol. 456] A I do not.
Q All right. Do you recall the following series of questions and giving the following answers:

"Question: Were these three-cent bags or nickel bags?
Answer: Nickel bags.
Question: When we say nickel, we mean five dollar bags, is that right?
Answer: That's right.
Question: Did that happen last night?

Answer: It happened last night.
Question: Do you remember what time?
Answer: No, I don't."

Q (continuing) Do you recall being asked those and giving those answers?
A No, I do not.
Q You do recall that this questioning took place on January 7th, 1966, is that correct?
A If that's the day I was arrested.
Q And Mr. Harris, you don't recall being asked any of those questions or giving any of those answers?
A No, I do not.
Q But you do recall being questioned—
THE COURT: The witness has already said he does.
THE WITNESS: May I make a statement?
[fol. 457] MR. PROJANSKY: Your Honor, at this time I'd like renew my objection and strike to remove that entire line of interrogations on the grounds previously stated, and I'll ask at this time—Your Honor as I anticipate will deny my request—if you will please instruct the jury that prior statements inconsistent with the defendant's testimony on direct examination may be considered by them only as to his credibility and not as to proof of the—herein.
THE COURT: No, I will not. I will not do that. I will charge them as to what they may consider this as, any other evidence in connection with this particular case, bearing upon the weight of the testimony of this witness. But I will deny your renewal of the motion that you made at the outset of this examination, Mr. Projansky, and grant an exception.
MR. PROJANSKY: Yes, Your Honor.
THE COURT: All right.

CROSS EXAMINATION CONTINUING BY MR. FACELLE:

Q Mr. Harris, do you recall being asked the following series of questions and giving the following answers:

"Question: Viven—"

MR. PROJANSKY: Excuse me, Your Honor, may we have the time and date set as to these questions?

[fol. 458] THE COURT: Yes.

Q Do you recall—

THE COURT: Mr. Projansky is asking you, are you back to—

MR. FACELLE: The same reference, Judge.

THE COURT: Mr. Projansky asked you for the date.

MR. FACELLE: All right.

Q Do you recall being questioned by me at my office, at the District Attorney's office on January 7th, 1966, at approximately 7:10 P.M.?

A No, I do not. Mr.—

Q You don't recall talking to me that night?

A I recall talking to you. Mr. Facelle—

Q Wait, just answer my questions please, Mr. Harris.

A I have a slight concussion, I do not remember everything that happened in the past.

MR. FACELLE: Voluntary statement.

THE COURT: The witness says that he does not remember everything that happened in the past.

THE WITNESS: I have a slight concussion; has been in the hospital.

MR. FACELLE: If Your Honor please.

Q Did you have a concussion on the night of January 7th, 1966, Mr. Harris?

[fol. 459] A I was in a car wreck four years ago. I been having four years, I've laid in Grasslands Hospital one month behind it.

MR. FACELLE: If Your Honor please, may we have an answer to a question?

THE COURT: No, I'll allow it. He said that he remembers your interrogation. Don't you remember talking to Mr. Facelle?

THE WITNESS: I remember talking to Mr. Facelle, I said that.

THE COURT: The thing is, you are saying to the ladies and gentlemen of the jury that you do not recall what the questions were or what answers to them you gave?

THE WITNESS: That's right.

THE COURT: All right.

the following questions

s?

Q Do you recall being asked
and giving the following answer dy make any promise to

"Question: Viven, anybo
you?
Answer: Nobody made r
Question: Anybody mak
Answer: Nobody made

no promises.
e any threats to you?
any threats."
stain an objection on that

THE COURT: No, I will sus
basis.
[fol. 460] MR. PROJANSKY:
have a continuing objection?

Your Honor, I assume I
continuing objection. I

THE COURT: You have a Mr. Projansky, that you
realize that, but I'd just prefer, question is asked rather
make the objection at the time jection.
than to consider a continuing ob

Q Do you recall being asked the following two ques-
tions and giving the following tw o answers:

"Question: What you t
Answer: Yes.
Question: And you hav
untarily?
Answer: Yes."

old us was the truth?
e told us freely and vol-

Q (continuing) Do you re call being asked those two
questions and giving those two answers?

A No, I do not.

MR. FACELLE: If Your H onor, please, may we have
this marked as People's Exhibit for identification.

THE COURT: Only.

(Received and marked for identification as People's Exhibit 6.)

MR. FACELLE: I have no further questions, Your Honor.

THE COURT: Ask Mr. Projansky if you and the
[fol. 461] defendant and Mr. Facelle and the stenographer
to come in for a second, please.

(Recess to the Court's Cha mbers at 4:19 P.M.)

(Resuming in the Court's Chambers in the absence of the jury. The defendant and both counsel are present.)

THE COURT: Mr. Facelle, Solely for the purposes of the record, at this particular stage and on behalf of the defendant, is the District Attorney prepared to state for the record whether or not the required warning under the Miranda Case were given to this defendant prior to the taking of the statements?

MR. PROJANSKY: Your Honor—

MR. FACELLE: I submit, Judge, that this is a rather difficult question for me to answer, only because perhaps I am not knowledgable enough or sophisticated to know exactly what the required warnings are. I submit that warnings were given to this defendant which appear in the People's Exhibit for identification, that he was advised.

THE COURT: May I look at them, may I look at the Exhibit?

(People's Exhibit 6 for identification handed to the Court.)

[fol. 462] THE COURT: Other than what appears in the record here, did you give any other warnings other than those which are incorporated in People's Exhibit 6?

MR. FACELLE: No, Sir, I did not.

THE COURT: All right, then it is the Court's opinion at this time that the Exhibit marked for identification indicates that such warnings as are required under the Miranda Case were not given to the defendant.

MR. FACELLE: Well, may I, Judge, I think that the Court—

THE COURT: It appears to the Court.

MR. FACELLE: Well, may I respectfully submit, Judge, that the Court has not read the Exhibit and I think perhaps that—

THE COURT: You sit outside. "The only question I find here is somebody said to him, "You don't have to talk to us. Is there any question in your mind that you don't have to talk to us if you don't want to." And the

answer is, "No." Now, if you will show me any other thing then that statement made in there—

MR. FACELLE: May I then continue, with the Court's permission, and read certain questions bearing on the Miranda requirements.

THE COURT: If they are.

[fol. 463] MR. PROJANSKY: Excuse me, Your Honor, may I be heard herein? I'd like to ask Mr.—I think defense counsel ought to have an opportunity to see this.

THE COURT: You can.

MR. FACELLE: I have no objection to that.

THE COURT: You can.

MR. PROJANSKY: It seems to me, Your Honor, unless Mr. Facelle or some other person in the District Attorney's office at that time and in that place advised the defendant that he was entitled to counsel then and there, and that in the event he couldn't afford counsel, that he would be provided with counsel upon his request and expression of indigency—

THE COURT: You have a lot of support in two dissents in the Kulis Case, Mr. Justice Keating and Mr. Justice Fuld.

MR. FACELLE: May I at least put this, since the Court has referred to it, my question, "That you do not have to talk to us if you don't want to." Next question was, "If you do talk to us, you're going to tell us the truth, is that right?" And the answer was, "Yes." The next question, "And if you talk to us and you tell us the truth, you know it can be used against you? Answer: Uh-huh." "No question about that in your mind is there? Witness shakes his head no."

[fol. 464] THE COURT: All I want the record to reflect—

MR. FACELLE: May I continue, please, Judge? It's a question of counsel, he was asked abount counsel.

THE COURT: No, please. Now all I want to say is that man was in custody at the time that this examination was taken, and the interrogation is an in-custody interrogation.

MR. FACELLE: Judge, may I please, on the question of counsel, the defendant in this case requested counsel.

MR. PROJANSKY: Your Honor, I think that—

MR. FACELLE: May I please continue, Judge? "Question: I want to know exactly what happened? Answer: Yes, but I'd rather see a lawyer before I keep on." This is all before the colloquy which was put on the record before the jury, the defendant said, "I would like to see a lawyer before I keep on." "Question: That is your privilege, that is your right. You want to call one up now? Answer: No. Question: What? Answer: I'll call tomorrow. Question: You'll call him tomorrow? Answer: Yes. Statement by Mr. Facelle: Okay, take him out. Question: I will put on the record you can call a lawyer right now if you want, any question about that in your mind. Answer: [fol. 465] Wait a minute." And I think this section, again, Your Honor, I'll put for the record, that this all preceeds the colloquy which was put on the record.

THE COURT: All I feel—

MR. FACELLE: There's more, Judge, because I established there was a waiver here and if I may continue.

THE COURT: No, don't do that, don't do that. All I feel is that this could be incorporated as colloquy in here, by virtue of the fact that the Kulis Case is decided under Escobedo Principles, not under Miranda Principles, and this is seems to me will have to be resolved at an Appellate level, as I remember the Kulis Case.

MR. FACELLE: Now—

THE COURT: Is that correct, Mr. Projansky?

MR. PROJANSKY: I will assume so, Your Honor.

THE COURT: No, you have it out there. The Kulis Case was decided and Mr. Justice Keating in his dissent said that I feel that the Miranda supercedes this decision, so—

MR. FACELLE: May I please continue, Judge? There's two more sections here which I believe must be placed on the record, since the issue has been raised of Miranda and Kulis. After the defendant had stated that [fol. 466] he wished to see a lawyer and I told him that he could call one and to take him out, he asked, "Okay, what's the question? Go ahead." Will you note down what my question was and then there was question and answering. The last question put to the defendant in this state-

ment, Your Honor, and I would like it on the record, after I said "You were told this freely and voluntarily? Answer: Yes. Statement or question by Mr. Schneider, was it your own decision to talk after you wanted a lawyer? Answer: I don't understand the question. Question: By Mr. Schneider: I said, you decided you wanted and then you said you wanted to shoot, go ahead and ask the question, right? Answer: Yes. That is your own decision? Yes."

THE COURT: Mr. Projansky and I would like to have a copy of that statement delivered to Mr. Projansky, if you will, please.

MR. PROJANSKY: May I review that for just a moment, Your Honor?

MR. FACELLE: That's my only copy, the only copy.

THE COURT: Will you see that he gets a copy?

MR. FACELLE: Yes, Judge.

THE COURT: All right.

MR. PROJANSKY: It's marked for identification.

[fol. 467] MR. FACELLE: That's my copy. The one that is marked for identification is still in Court.

THE COURT: We have the record made and we will see that you get a Xerox copy of the original to Mr. Projansky.

MR. FACELLE: That's correct, Judge.

THE COURT: All right.

MR. PROJANSKY: Will the record show that at this time that this is a cursory examination of this copy of the interrogation that Mr. Facelle has handed to me. Your Honor, I would like to point out to the Court that there was interrogation as to material facts herein prior to any mention of an attorney, that the mention of an attorney first appeared on page 6.

THE COURT: You may be, Mr. Projansky, may be one hundred percent correct.

MR. PROJANSKY: In addition, Your Honor, without referring to the contents of this document, I would like to say, Your Honor, that I take strong objection to the procedure herein and this was presented to the jury before any examination was had, so that legal voluntariness of this statement and—

THE COURT: Let the record reflect, Mr. Projansky, for you, that you are taking an exception to the fact that under the Huntley case, it was not offered on a basis of [fol. 468] notice required under 831 of the Code of Criminal Procedure, that you also have an exception under the fact that it violates the Miranda against Arizona decision, in the United States Supreme Court.

MR. PROJANSKY: And Your Honor, at this time I would like to mave for the withdrawal of a juror.

THE COURT: You have to do that in front of a jury.

MR. PROJANSKY: I'll do that, Your Honor.

THE COURT: In front of the jury and I will instruct the jury that this is the only awkward method by which you have to protect the record with this. I will deny your motion, I think when we get out there.

MR. PROJANSKY: Yes, Your Honor.

(Recessing to the Courtroom at 4:30 p.m. The defendant and both are present.)

THE COURT: Are you through with this witness?

MR. FACELLE: Yes, Your Honor.

MR. PROJANSKY: Your Honor, at this time I'd like to move for a withdrawal of a juror, citing as authority, grounds for my motion herein, the case of Miranda v. Arizona. The People versus Huntley and Section 813c of the Code of Criminal Procedure.

[fol. 469] THE COURT: Yes. I will deny your motion, Mr. Projansky, and grant you an exception. It is an awkward method by which one must follow a procedure, but again, and I caution the jury that there will come a time, that matters of law are those for the Court and counsel, and you must not make any interpretation of my ruling of law, if you will, please. All right. Is there any redirect of this witness.

MR. PROJANSKY: Yes, Your Honor.

The defendant Viven Harris, having been previously duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION BY MR. PROJANSKY

Q Viven, you testified earlier on direct examination that there was a panic on in December and January, December of 1965 and January 1966?

A That's right.

Q Now, what does the word panic mean among drug users?

A When drugs are very scarce.

Q Does it mean that there are no drugs whatsoever?

A No, sir. It means that drugs are very scarce.

Q But that one can sometimes purchase drugs even during a panic?

A One can sometimes purchase drugs during a panic.

Q And Henry Stanley, is he a real person known to you?

[fol. 470] MR. FACELLE: Objection, Your Honor.

THE COURT: No, I will allow it.

A Yes.

Q Do you know his whereabouts today?

A Yes, sir.

Q Do you know where he is right now?

A I couldn't say exactly where he is, but I know he—moved to the Bronx, that's all.

MR. PROJANSKY: No further questions, Your Honor.

RECROSS EXAMINATION BY MR. FACELLE:

Q Do you know where in the Bronx he moved to?

A I do not.

Q Do you know how to locate him?

A No.

MR. FACELLE: I have no further questions.

THE COURT: You may step down, Mr. Harris.

THE WITNESS: Thank you.

(The witness was excused.)

* * * *

STATEMENT OF PETITIONER

STATEMENT OF: VIVEN HARRIS, 149 Guion Avenue, New Rochelle, New York, taken Friday, January 7, 1966, at 7:10 p.m., at the office of the District Attorney, Westchester County Courthouse, White Plains, New York, in connection with an investigation into the sale of narcotics, in the presence of Assistant District Attorney Thomas Facelle, Assistant District Attorney Warren Schneider, Assistant District Attorney Thomas Morosco, Criminal Investigator Dan Gallagher, Office of the District Attorney, White Plains, New York, Detective John Brackin, New Rochelle Police Department, New Rochelle, New York, and Stanley C. Post, stenographer, as follows:

[fol. 2] BY MR. FACELLE:

Q What is your name, (spelling) V-i-v-a-n or e-n?
A E-n.
Q What is your last name?
A Harris.
Q Have you ever been known by Viven Hairston?
A No.
Q Where do you live?
A 149 Guion.
Q New Rochelle, right?
A New Rochelle.
Q All right. You know my name is Facelle, and you know I am an Assistant District Attorney, right?
A Yes.
Q And you know these other people in the room are either police officers or Assistant District Attorneys, any questions in your mind about that?
A No.
Q All right. Any question in your mind that you don't have to talk to us if you don't want to?
A No.
Q If you do talk to us, you are going to tell us the [fol. 3] truth, is that right?
A Yes.

Q And if you talk to us and you tell us the truth, you know it can be used against you?
A Uh huh.
Q No question about that in your mind, is there?
A (Witness shakes head no.)
Q Are you going to tell us the truth?
A I'm going to tell you what I know.
Q And what you know, is it going to be the truth?
A Yes.
Q All right.
A From my point of view.
Q All right. Now who picked you up tonight?
A Eddie and Joe.
Q About an hour ago?
A Yes.
Q Where?
A Lincoln Avenue.
Q Did they tell you that they were police officers?
A No.
Q They didn't tell you?
[fol. 4] A (Witness shakes head no.)
Q But you were arrested by police officers, weren't you, from New Rochelle?
A Uh huh.
Q Do you know now that this Eddie and Joe are police officers?
A Uh huh.
Q Did you ever know their last names?
A No.
Q When did you first meet them?
A About a week ago.
Q Where?
A Three Fours.
Q What did you talk about?
A "Skag".
Q When you say "skag", you mean heroin, right?
A Yes.
Q Did you do anything with the men?
A No, not the night I met them.
Q All right. On January 4th, which is only Tuesday of this week, did you meet Eddie and Joe?

A Yes, I saw them.
[fol. 5] Q Who were they with?
A They was in the Three Fours.
Q With who?
A Just a lot of people.
Q No, who was Eddie and Joe with?
A I don't know. I guess they was there by theyself.
Q No, did you have any conversation with them about "skag"
A Yes.
Q All right, and then what happened?
A Nothing.
Q Nothing happened?
A (Witness shakes head no.)
Q Did you go any place with Joe?
A (No answer.)
Q You already told us now.
A It ain't on that thing there (referring to reporter's stenographic machine).
Q I want to know, so there's no misunderstanding, about what you told us, but I don't want you or me saying anything that you didn't say. I want it down exactly the way you told us so there is no misunderstand-
[fol. 6] ing.
A Yes, but I'd rather see a lawyer before I keep on.
Q That's your privilege. That is your right. You want to call one up now?
A No.
Q What?
A No, I'll call tomorrow.
Q You will call him tomorrow?
A Yes.
MR. FACELLE: Okay, take him out.
Q I will put on the record you can call a lawyer right now, if you want. Any question about that in your mind?
A Wait a minute. We will be booked tonight on, I don't know, on what charges, could you tell us that?
Q Sure.
A What?

Q Sale of narcotics.
A Sale of narcotics?
Q Uh huh.
[fol. 7] A Everybody out there selling narcotics?
Q I am talking about you. I am talking about Viven Harris, I am not talking about anybody else. You better let them worry about themselves, and everybody is taking care of themselves, so you worry about Viven Harris.
A Okay. What's the question? Go ahead.
Q You know what my question was.
A No, what is the question?
Q What did you do Tuesday night with Joe?
A He drove me to get a bag for him, and I got it for him.
Q All right, in his car?
A In his car.
Q He wanted a bag of what?
A "Skag".
Q All right, how much?
A A nickel bag.
Q All right. And he drove you some place?
A He drove me some place.
Q Did you tell him where to go?
A No. He knows where to go.
[fol. 8] Q He knows where to go?
A He knows where to go.
Q You didn't tell him where to go?
A I didn't tell him where to go.
Q The two of you got in the car and he just drove there?
A Yes.
Q He parked the car?
A Uh huh.
Q Did you drive or did he drive?
A He drove.
Q All right, he drove and he parked the car, and then you got out?
A Uh huh.
Q And you went inside?
A Uh huh.

Q Right?
A (Witness shakes head yes.)
Q Did he front the bread, or did you put it out yourself?
A He had it. He gave me the money.
Q All right, how much?
[fol. 9] A Five dollars.
Q How long were you gone?
A About two minutes.
Q And you came back with a nickel bag?
A Yes.
Q Where did you give it to him?
A In his car.
Q And then what did you do?
A He drove me home. I got out.
Q He drove you home to Guion Avenue?
A Uh huh.
Q That's all that happened that night?
A That's all that happened that night.
Q Now when is the next time you saw him?
A Last night.
Q Where?
A Three Fours.
Q Did you talk about "skag"?
A Uh huh.
Q Did he want you to "cop" for him?
A Yes.
Q Where did you go, same place?
[fol. 10] A Same place. No, out there.
Q Different place?
A No, the boy was standing outside the Three Fours.
Q You went outside?
A I went outside.
Q And Joe stayed inside?
A Joe stayed inside.
Q Who was sitting with Joe?
A Eddie.
Q Anybody else?
A No. Sal was around, Ronnie was around.
Q What did Joe tell you he wanted?
A He said he wanted some "skag".

Q Well, did he tell you one, two, three, half a load, bundle?
A He wanted two.
Q All right, then what happened? You went outside?
A Uh huh.
Q And you saw this man?
A Uh huh.
Q Then you came back?
A Uh huh.
[fol. 11] Q Did you give him two nickel bags?
A Yes.
Q How much did he give you?
A He gave me a taste.
Q How much did he give you?
A I got about a half a bag. He kept a bag and a half himself.
Q He gave you twelve dollars, didn't he?
A Oh, how much money?
A Yes. He gave you twelve bucks plus a taste?
A Yes.
Q When you say "a taste", you mean he gave you part of a bag?
A Yes.
Q Were these three cent bags or nickel bags?
A Nickel bags.
Q And when we say "nickel", we mean five-dollar bags, is that right?
A That's right.
Q Did that happen last night?
A It happened last night.
Q Do you remember what time?
[fol. 12] A No, I don't.
Q Did you do anything else with him?
A No.
Q Has he ever been up in your "pad"?
A No.
Q Viven, anybody made any promises to you?
A Nobody made no promises.
Q Anybody make any threats to you?
A Nobody made no threats here.
Q Anybody use any force on you?

A No.
Q Anybody lay a hand on you?
A No.
Q What you told us was the truth?
A Yes.
Q And you have told us freely and voluntarily?
A Yes.

MR. SCHNEIDER: Was it your own decision to talk after you wanted a lawyer?

A I don't understand your question.

MR. SCHNEIDER: I said you decided you wanted a lawyer, and then you said you wanted to shoot, go ahead and ask the questions, right?

[fol. 13] A Yes.

MR. SCHNEIDER: That is your own decision?

Q All right?
A Yes.

MR. FACELLE: All right, Stan.

(Whereupon the statement was concluded at 7:19 p.m.)

P's Ex. No. 6 for iden.
12/12/66 BF
People's Ex. 6

• • • •

[fol. 542] THE COURT: M
Gentlemen of the Jury:

We have reached the point
which I am sure you well rec
the evidence, heard the sum
People and for the Defendant,
enter upon your deliberations
It may well be for me to at
with you, to read to you a sec
nal Procedure, that you will u
we talk to you about the La
case, I am talking about decla
acted in the statutes by the Le
have been handed down by our
as they apply in your consider
stitutional provisions that are
a criminal case.

The statute provides that in
must state to them all matte
necessary for their informati
and must, if requested, in add
[fol. 543] its duty to say, infers of law which it thinks
the exclusive judges of all qion in giving their verdict,
phasize for you now, in the dition to what it may deem
function of a jury to pass uform the jury that they are
that are presented to you foruestions of fact. So I em-
ing to talk to you about that trial of a lawsuit it is the
must state to them that in upon the quuestions of fact
guilt, they must not consider r your resolution. I am go-
what we are about to emba a little later on. The Court
the Law, as a matter for you determining the question of
nation of the evidence that punishment. So this is about
ticular case. rk upon, is a discussion of

It almost seems unnecessa to utilize in your determi-
for me to say this, but judici you have heard in this par-
to, to say to you that we al
is a sacrifice on your part t ary, Ladies and Gentlemen,
busy people, you have other c ially I think I am compeled
fulfillment of this obligation ready all recognize that this
perior public service and, I s to be here, that you are all
that, so that you will be fla ommitments, and that in the
n you are rendering a su-
uppose even in implementing
ttered by what I have said,

r. Foreman and Ladies and

in the trial of this case
ognize, having heard all of
mation of counsel for the
that you are now about to
on the questions of fact.
the outset, in discussing it
ction of the Code of Crimi-
understand first, that when
w that applies to a given
arations that have been en-
egislature, by decisions that
r highest Courts, and as far
ration of the evidence, con-
accorded to defendants in

charging a jury, the Court

[fol. 544] I may say to you that George Washington is the Father of the expression that you see cut on the courthouse in New York County, that says that the Administration of Justice is the Firmest Pillar of Good Government, and you as a jury, about to undertake the responsibilities that are imposed upon you by your oath, are performing that great public function.

It may well be, Ladies and Gentlemen, when I talk about the Law that you may differ with it. You may not agree with the statements; these may strike you as contrary to what you might feel the Law should be. But remember that it is your responsibility to accept it as it is submitted to you and it should not be your concept of what the Law ought to be under a given circumstance that should control. This is part of your oath. Let me at this particular point point this out to you. You won't determine this, Ladies and Gentlemen, on what you think the evidence ought to be. You won't pass upon this if you fulfill your obligation as to what you think the proof ought to be in a given case. All you have, as the com-[fol. 545] modity that you will utilize in determining the case, is determining what the evidence is before you at this particular time, and this likewise goes to the propositions of Law that become necessary for you to have in resolving them, not what one will consider Law to be, but what it is insofar as the instant case is concerned.

Ultimately, you realize that you are going to determine the guilt or innocence of this defendant who is on trial here today by virtue of an indictment which has been handed down by the Grand Jury of the County of Westchester. As has been stated to you more informally, it becomes my obligation to say to you that an indictment is not proof of guilt. It is an accusation which has been handed down by the Grand Jury, and that under our system of jurisprudence, the way we live in this particular country, as far as the Law is concerned, this is the instrumentality by which this case gets into Court. It is a written charge against the defendant. It is not proof of his guilt. Therefore, I utilize the accepted expression

that an indictment has no provative value of his guilt of [fol. 546] the defendant.

May I at this moment, suggest to you or say to you, that all indictments are brought in the name of the People of the State of New York. This should not cause any constirnation and confusion on your part as to why it is brought. It is the way the Legislature, that the body politic in our Society is known, as the People of the State of New York, and therefore the vehicle, to wit, the indictment that brings this charge into this Court is brought in the name of the People of the State of New York. So may I for a moment point out to you what may seem apparent, but this makes a line of demarcation in the trial.

The District Attorney's Office is here representing the People of the State of New York. It is their responsibility under the law, in the fulfillment of their public duty, to submit to you, through evidence, such evidence as is available, if in fact it is available in support of the indictment.

The defendant appears here through able counsel, Mr. Projansky. It becomes the responsibility of the attorney for the defendant to utilize, on the defendant, all of his [fol. 547] skills and talents to the utmost in the defense of his client. This is his responsibility just as it is Mr. Facelle's responsibility.

Then there is to the Court accorded the responsibility of the Law and the conduct of trial. Then the component part is the jury which passes upon the facts.

I did say to you before, and I again repeat it to you, statement of counsel at any stage in the course of the trial is not evidence. You do realize that. The same way the summation of counsel is not evidence. I do not mean to convey to you that one should utterly ignore it, because it may, in the presentation of the arguments, it may be certain arguments that would commend themselves to you in your review of the facts, and you arrive at a sense of reason in your minds. But, the most important thing for me is to be certain that you understand that the statements of counsel never become evidence nor are they to be considered evidence in your deliberations.

This then brings me to what I had previously said, and

[fol. 548] I must re-emphasize it so that I eliminate this from your deliberations. Rulings of Law by the Court are not for the jury to consider. The sustaining or rejecting of motions, the sustaining or rejection of rulings of evidence are not matters for a jury to be concerned with. These are the responsibility of the Court in the progress of a trial, to channel to you, Ladies and Gentlemen such essential factual ingredients as would enable you to adequautely and reasonably pass upon the evidence. But you must not, and this would be detrimental to the defendant, most assuredly, detrimental to the People, seek to draw any interpretation from rulings that have been made by the Court from time to time in the course of this trial. If I had an opinion, Ladies and Gentlemen, the Law imposes upon me the duty that I must not permit this opinion to be in any way conveyed to you, and I reject the thought that in any possible way that you could interpret that any of these rulings or anything that may have been said in the course of the trial by me, as having any bearing in your deliberations and your function.

[fol. 549] In the trial of a lawsuit, and the charge that is necessary to try and break it into some general areas so you can follow me, there are general principles of law that apply to every criminal case. Then there are specific principles of law that relate to the charge which is brought here in this particular Court as against this defendant; and then there are specific provisions of law which relate to the general areas, fact, evidence, testimony. So permit me to start off with general principles of law and talk to you for a moment about the presumption of innocence.

Under our system of law, the Anglo-saxon, we have what is commonly called an accusatorial system, as contrasted with that section of the world that has what is called an inquisitory section. Inquisitory, the defendant is guilty when he is brought in and he has to fight his way out of that. Under our Anglo-saxon system of law, there is an accusation. I refer to the indictment, brought as against the defendant, that he is cloaked at the time that he comes into this Court, with a presumption of

innocence. By the way, this is not proof of innocence. [fol. 550] He is presumed to be innocent from the time the charge is brought, time of his arraignment, if in fact that occurred, he is presumed to be innocent as one goes to the trial, and he is presumed to be innocent when you go into your jury room, until under our system of accusatorial law, the People have met a responsibility imposed upon them and that is to satisfy you of the guilt of the defendant beyond a reasonable doubt. Then at that point you can visualize it, the presumption of innocence dissolves. If you are satisfied in your review of the evidence that the People have met the burden of proof of the guilt of this defendant beyond a reasonable doubt, the presumption of innocence disappears. So it is that continuing condition that protects a defendant until the People, if in fact they do, meet the responsibility that the statute places upon them. So when we talk about the subject of burden of proof, beyond a reasonable doubt, you will keep this in your mind. I am going to come to it a little later because it really isn't very complicated, though it sounds in this respect.

[fol. 551] What is it that the Grand Jury charged this defendant with? The Grand Jury of the County of Westchester charged this defendant Viven Harris, of the crime of feloniously selling a narcotic drug, violation of Section 3305 of the Public Health Law, and Section 1751 Subdivision 1 of the Penal Law, which was committed as follows: The defendant in the City of New Rochelle, County of Westchester, State of New York, on or about the 4th day of January, 1966, unlawfully bartered and exchanged with and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin. Solely again in the line of delineating the areas, that is known as the first count in this indictment.

Then there is a second count which is really the second charge against the defendant. The second count is stated that the Grand Jury aforesaid, by this indictment, further accuses the defendant of the crime of feloniously selling a narcotic drug in violation of Section 3305 of

the Public Health Law, and Section 1751 Subdivision 1 [fol. 552] of the Penal Law, committed as follows:

The said defendant in the City of New Rochelle, County of Westchester, and State of New York, on or about the 6th day of January, 1966, unlawfully bartered and exchanged with and sold, gave and offered to give to another a quantity of a narcotic drug, to wit, a quantity of heroin. All of the acts and transactions alleged in each of the several counts of this indictment are connected together and constitute parts of a common scheme and plan, and all are contrary to the form of the statute in such case made and provided, as against the peace and dignity of the People of the State of New York.

Lest in reading this indictment you may wonder what it means to talk about Section 3305 PHL. If you will recall when I started off, I mentioned to you that acts of Legislation delineate and define what are crimes against the peace and dignity of the State of New York. Section 3305 PHL provides, it shall be unlawful for any person who manufactures, possess, have under his control, sell, prescribe, administer, dispense or compounds any nar- [fol. 553] cotic drug, except as authorized in this article. And you can eliminate from your mind any claim of authorization in this particular case.

It goes a little further, too, Ladies and Gentlemen, the Section 3305 of PHL when it has described a general area prohibiting the sale of or barter or giving of a narcotic drug, because it defines what a sale is. So the Legislature says that when we have utilized in the context of the section that I just read to you under the PHL, the term sale means this. Barter, exchange, or give or offer to sell, barter, exchange or give therefor, and each such transaction made by any person, whether as a principal, proprietor, agent, servant and employee. So may I respectfully call your attention to this fact, that the giving unlawfully and with an intent to give, of a narcotic drug, could be construed under the statute as a sale, if you had listened to what the statute says a sale would constitute. I want to point out to you that this doesn't follow our common everyday concept of a sale where we think of a sale as a transaction of buying and selling; [fol. 554] you can barter it, you can exchange it, give it,

or offer to give it, or offer to exchange or offer to barter. And each such transaction made by any person, whether that person be a principal, agent, servant or a proprietor. That is what Section 3305 of PHL says. Then that's keyed back and I want to explain this so that it would not in any way create any confusion in your mind, when the two references come up, the declaration under the PHL that makes it unlawful to sell the narcotic, then is tied into the Penal Law. The Penal Law, Section 1751, which I just read to you, Subdivision 1 of the Penal Law, says that any person who shall barter or exchange with or sell, give or offer to give to another any narcotic drug, in violation of Article 33 of such law of 3301 of the Public Health Law, and I just read that to you, that definition of sale, came from 3301 of the Public Health Law, shall be punishable, so bear in mind the dual reference to the declaration of the Public Health Law which says it is unlawful, becomes criminal by virtue of the provisions of the Penal Law, under section 1751, and this is why it is here for you.

[fol. 555] The defendant, to the indictment, pleads not guilty. What does this mean? This means that the defendant puts in issue all of the material facts alleged in the indictment, including the fact that there was a quantity of heroin sold on these given days. So when I said to you a little while ago, and again I shall repeat it, that the burden of proof is on the People and it never leaves the People. It is the duty of the People to satisfy you beyond a reasonable doubt that, he, the defendant, Viven Harris, on the 4th day of January, 1966, sold a quantity of a narcotic drug, to wit, heroin. And in the second count, it becomes the duty and responsibility of the People under the Law, Public Health Law, the Penal Law, to satisfy you beyond a reasonable doubt that he, the defendant Viven Harris, on the 6th day of January, 1966, sold, bartered, exchanged within the definition that I gave you, a quantity of heroin, in violation of the statute.

What is it the People offered in proof? In reviewing this, Ladies and Gentlemen with you, I am sure I just dropped into a realm of repetition when I say to you this

[fol. 556] is your function to find these facts, if they in fact have been established, and it is your function to give such weight and credibility, if in fact there is weight and credibility to give to this testimony. So in relating or briefly reviewing the notes that I have here, that are offered in support of this indictment and which are controverted by the defendant, you understand that I do not say that these are established as conclusive evidence in any sense of the word. This is your function and I may not intrude into that area, and if your recollection as to the facts should be different, it is your recollection completely, and I simply do this to try and place the area of proof into an orderliness and refresh your recollection, if in fact it needs any refreshing, because though we have spent lots of time, the facts are not really extensive.

The People called Detective Bermudez. You will recall that he indicated that he had been with the New York City Police Department for a period of 11½ years; that he worked in the Narcotic Bureau of the New York City Police Department for 10 years; that he was a First-[fol 557] grade detective and 32 years of age; that among his duties as a member of the New York City Police Department were in an undercover capacity, or to infiltrate narcotics activity, procure information and to make purchases of narcotics when and if possible. You will recall that he described to you the training, he described to you the area of his activities in this capacity, both on behalf of the Police Department in the City of New York, that he spoke Spanish fluently, that he was able to write it, that he had participated in various police schools. And why all of this? I am going to come to this statement later on and I will repeat it now, because these are items that you may want to consider in determining credibility of the witnesses, as to how much one would accept and how much weight to give to testimony that people gave.

He said that he had made numerous purchases of narcotics over his period of time, 900 to 1000, and that he knew Inspector Carey or Commissioner Carey of the New York City Police Department, and in fact, when Commissioner Carey had been with the New York City Police

[fol. 558] Department, before going to the City of New Rochelle, he had worked under him; that he was asked by Inspector or Commissioner Carey to come to New Rochelle to assist in an investigation, an undercover investigation into the realm and activities of narcotics, and that he went to New Rochelle with his associate or buddy, as he used the term, on December 6, 1965; that an alias utilized by him when he went to New Rochelle was Joe Vargus or Joseph Vargus, and that Eddie Que, who later testified before you as Detective Parks, was his companion in this investigation; that he met the defendant and identified the defendant in this Courtroom as having met him on January 4, 1966, and that he had a conversation in the Three-Fours Bar and Grill at about 6:30 on the evening of January 4, 1966. There was conversation about the guitar, an electronic guitar, and there was a discussion about a price of $35.00 for the guitar, and that ultimately he saw the guitar and that the guitar was purchased; that there was some conversation with Mr. Harris, the defendant, who said that he [fol. 559] had to go to a laundromat, and that then he also said he had to go downtown to score a half a load, and I am sure that by now, after your being here, it becomes unnecessary for me to review what this means in the narcotics trade as vernicular, but represented a purchase of a quantity of narcotics; and that this took place about 5:30 or 5:35 on the evening of January 4, 1966. And that around 7:10 that night, he went around to the laundromat, that Mr. Harris wasn't there, and that about 8:10 that night he again saw Mr. Harris, and there was talk again about the guitar and he drove to Guion Place, talked to Harris; Harris said or told him he would take half a load. Then that the defendant said to him I have just started action again, I'll speak to Al Payne; then they went to 149 Guion Place, that he, the officer said he was driving a Buick Skylark with New Jersey plates, parked the car and went upstairs and met the wife of the defendant and the transaction took place regarding the purchase of the guitar and a price of $25.00 was agreed upon and he gave the defendant $30.00. Then put the

[fol. 560] guitar in the trunk and went outside of the poolroom, and then there was a discussion about $35.00 for a half a load and the conversation with the defendant involved $30.00, and then something was said about, "let's forget about it," and there was a purchase made of 1 bag that evening; and that the defendant wanted $7.00 for that bag, there was an argument about $5.00, and that that was the $5.00 that was left over from the transaction from the guitar. And he gave, according to Detective Bermudez, he gave Detective Bermudez this one packet. In reply, by the way, to a question that the detective answered, that you always haggle over price, that there was always bargaining, that if you gave in too fast, this was one of the mechanisms by which someone spotted one experienced in the narcotics area.

He said that he took that packet over to the car, signed and sealed it, put a gum tape, wrote on it, wrote his shield number on it, place, time and amount and this was all standard procedure, and you do recall, Ladies and Gentlemen, that there was introduced in evidence here [fol. 561] before you what he, Officer Bermudez, as testified, to first as the envelope with the markings there on it, that you have seen, and then the contents which had the small rectangular piece of tape, and you will recall that there was an additional long piece of tape that appeared and that was identified by the chemist from the police department, and a tape having been placed upon there but Detective Bermudez says that that exhibit contained the heroin that he purchased from this defendant on January 4, 1966.

He says, again, on January 6, 1966, about 8:20 or 8:25 there was a meeting inside the Three-Fours Bar in New Rochelle, that the defendant came in, he asked, "what's happening. Nothing, everything is quiet." That the defendant told him that the price was $7.00; that he, Bermudez, said I'll go $6.00, and he came back to the bar about 8:40, and he got into a car across the street and while in the automobile that was parked across the street in New Rochelle, he handed me two decks of heroin and I paid him $12.00. Then there was the conversation you

[fol. 562] will recall, that has been discussed in front of you or that Detective Bermudez says took place in the car, about the selling of junk in New Rochelle and Yonkers and Connecticut, and there was a discussion with him about asking Detective Bermudez to go to business with them in the State of New Jersey. There was a discussion that he was paying, he, the defendant was paying $30.00 for a half a deck in Yonkers, and then he got into the car, Detective Bermudez says, with the Detective Parks and then you have exhibit #3 and #4 which constitutes the brown envelope, and the contents containing the two glassine packets, that are alleged to have been in that brown envelope from the time that they left New Rochelle to the police laboratory and in New York City for testing.

There was, on cross-examination, he was asked, as to the methods in which he, while doing undercover work, was he indulgent in, and he said he posed as a snorter, which is a person who takes heroin through the nose, a knock-around guy, stick-up guy, guy that's on the lam, a [fol. 563] stick-up guy, and he said I gave different stories to different people, that he was reimbursed for his out-of-pocket expenses from the City of New Rochelle Police Department; that in the year 1966 that he had made only two purchases of narcotics as far as his own office was concerned in New York City. He said that it was dangerous work, that he was engaged in a general investigation, that they did not employ an informer and he said that I again, on cross-examination, told them, and because, Ladies and Gentlemen, you realize that replies of witnesses fall into the two brackets: they fall into the bracket of direct testimony and the answers which may be elicited from a witness, on cross-examination becomes germane. Let me just pause here for a moment and say that when you review the evidence, you review it in its entirety. So when I just cover a few of the points, you may have different recollections in reference to this, or I may not be as extensive as your recollection is. I am just simply placing before you that evidence, the testimony of [fol. 564] witnesses and exhibits, and the testimony or answers given on direct and cross-examination.

He said that I told him that I was stick-up man, that I did serve time in jail, and that his job was to obtain the source of supply and to go after the pusher, that he had made purchases from drug addicts who were pushers and he said I'll buy drugs from anyone who will sell it, and he said you have to be very cautious in your dealings with these people because narcotic persons are extremely suspicious. He said that he had never used narcotic drugs, but that he had posed as a narcotic user and he said that he was not called upon to prove himself as a narcotic user, but that if, of necessity, he was called upon, he told you that he would snort what I think he used the term to be, a dummy bag. He said that he told them different stories, that he had in his time purchased different quantities of narcotics and all kinds of narcotics, and that in heroin, the smallest is a taste and they come in kilos, bags, keys, and that they had the three-[fol. 565] cent or tray bag and the five bag and the ten-cent bag; that panic meant there was no junk on the street, there was a shortage of drugs on the market, and that bargaining for the purchase of narcotics, in the manner that he described to you, depended upon with whom you were doing business. He said that the job of the investigation that he was engaged in was to weed out the pushers, and that all of the data which involved his investigation was written down by him in notes or that believed that he had written them down; that on January 6, 1966, there were some discussions about half-loads. He did not offer to sell it to me, referring to the defendant, the half-load, Viven Harris, I made an offer to sell to him and he then made the offer to go into business; that the defendant told him that he, the defendant, had been in action, and this I again impose upon you to simply say this means that he was in the business of selling narcotics, that he had stopped for a while, and that he was back in action again. He was asked whether or not he was able to identify heroin, and he said he was un-[fol. 566] able to identify heroin; that he never saw the defendant Harris use drugs and that his present assignment in New York City Police Department was that to work on major violators in New York City.

I say in reviewing Detective Bermudez' testimony, I have not vouchsafed for his answers either on direct or cross-examination, and I am simply, as I said to you, going over notes which I read during the course of the trial, but these do not intrude into your province at all.

The second witness the People called was Frank Schurr. You will recall his testimony of having gone, I think it was to the City College of New York, and that he had a Bachelor of Science and he had been with the Police Department in the City of New York, and that for approximately 16 years his work had been essentially narcotic analysis and that he had, over the last five years, tested thousands of them.

He identified exhibits #1 and #2 and #3 and #4, if you will recall, and if you accept what he says, of course, [fol. 567] from numbers and letters on the brown envelope and from the tape inside, he identified these exhibits as having been exhibits which came to him and he described to you the manner in which these exhibits were opened, the condition that they were in at the time that he received them, and what he did with them and what tests that he made in connection with them, because, of course, I said to you before, it becomes incumbent upon the People to prove every essential element in this case, and one of the elements is to establish that portion of the indictment that there was heroin sold. So it becomes important for you to determine whether his testimony is entitled to credibility and as to what weight, and you take into consideration his background, his appearance, as you will, and I will go over it later as to all of the tests and whether what he was telling you is accurate, reliable, truthful, and as to whether you accept his statement that what was in these envelopes here were, in his opinion, as a chemist for the New York City Police Department, heroin. He said he did not know Detective [fol. 568] Bermudez. He said he made the test of one group, that was number 122, that was on January 7, 1966; and on the one that was numbered 138 he made on January 10, 1966. He said he did not receive these items from Detective Bermudez but that they were delivered to the police laboratory in New York City, so it is for you

to say, in reviewing these exhibits, whether you are satisfied that these exhibits were in the condition that Detective Bermudez so testified; and the chain that delivered them to the police laboratory, it's a chain of possession, that's what is, and this is being offered to you as proof of these circumstances, and as to whether the packages that he, Mr. Schurr had in New York City were the packages that were delivered in New Rochelle, and were they the packages that Detective Bermudez says were turned over to him or purchased by Detective Bermudez from the defendant in this particular case. He said that you don't test heroin for quantity, you test it for the quality of the heroin, and that the test doesn't show the amount of the quantity and that you remember that he said [fol. 569] necessarily that one-tenth of one percent of a grain would be needed for a test; and that they utilized four tests. You will recall that. But these were sequence tests and one ended up in a microscopic examination, and that he says based upon his experience and based upon the examination he made and the test that he applies and as a chemist, that the contents of the three glassine envelopes that are here and present in Court as exhibits, contain heroin, and that heroin is a narcotic drug. But it is for you to determine whether this is credible and acceptable and believable testimony under the circumstances.

Detective Parks was called by the People. He said he had been a police officer for about 4 years, and it was he who stated that there are approximately 12 or 14 men in the City of New York out of a squad of 25,000 men who are in the undercover area of the Narcotics Bureau; and that he was 26 years of age, married and with 3 children; that he was assigned to New Rochelle to perform a nar- [fol. 570] cotics investigation at the time that he was a patrolman, and their job was to go into the neighborhood of narcotic users and to search out pushers, is possible; that he had made approximately 200 or 250 buys, and that he operated the City of New Rochelle under the name of Eddie Que; and you will recall, Ladies and Gentlemen, there was some testimony that both of these gentlemen testifying for the People said they lived in New

Rochelle in some apartment up over a bar at the time. He said that he met Viven Harris in New Rochelle and the first time he met him was in the Three-Fours Club on January 4 at about 6:30. There was some talk about a guitar and that he, Parks, was to go to the house and look at the guitar and that he went to the house; and that Joe Vargas was the name that was used by Detective Bermudez. He He said that on January 4th he saw Viven Harris in the company with his partner Bermudez. He said he heard no discussions about narcotics, and he overheard the defendant ask Bermudez about the guitar and that he had to go downtown and cop a half a load. [fol. 571] He said that he saw the defendant later in the evening, at the Three-Fours Bar, that the defendant and his partner left, they were gone about 25 minutes and they then returned.

He said that on January 6, 1966, he was with Bermudez and I saw Bermudez go into the bar. Then he saw Bermudez enter the car and he saw the defendant Viven Harris get into the automobile of the detective; saw them move toward each other, and then he, Bermudez came back to the bar after he, Parks, had gone into this bar; said he never saw the alleged sale take place but he said that he saw the gum taping that was part of the exhibit that he had marked on the exhibit his shield number. He admitted on cross-examination or stated on cross-examination that his recollection had been helped to be refreshed by notes that had been taken by his partner or also questions that had been asked of him by Mr. Facelle; and he said that he, again on cross-examination, that the car of Bermudez was parked across the street from the Three-Fours Club on the opposite side of the [fol. 572] street. He said that he was not in New Rochelle every day, that he lived there part of the time and he lived above the 400 Bar and Grill. That was the testimony. The window in the car was open, that night, and he said that the notes which were made by Detective Bermudez were made within an hour after the purchases. He said he posed in New Rochelle as a hoodlum and as a stick-up man from New York City, narcotics user, and he said that he had snorted a dummy bag one time in the

men's room in the Three-Fours Club; said that he had never solicited anyone to purchase narcotics in New Rochelle and said that he never utilized narcotics.

On that, the People have said that we have met the burden of proof. The People say that this testimony that we have offered, and if you bear in mind it has been said to you that the defendant does not have to take the witness stand, the People say that when you review all of this testimony, you put in its proper context, we have established to you beyond a reasonable doubt at this [fol. 573] stage the burden of proof the guilt of the defendant.

The defendant comes forward and takes the stand and denies ever making any statements. The defendant says that he did meet Detective Bermudez on the night of January 4, 1966, that there was no discussion about a guitar, and that there was no sale of any narcotics by him to Detective Bermudez on that particular evening. He says that on January 6, 1966, he saw Bermudez, that he knew him as Joe Vargus, and that he was there with a friend of his, and they were in the club and they decided to, because of Bermudez' insistence in purchasing the narcotics from him, that they would go around to this fellow Stanley's house and they concocted something that consisted of baking powder, put it in glassine envelopes and they came on back to the place and before they would give him the glassine envelopes and take his money, they insisted that he buy a beer, and that he the defendant did not turn over to Detective Bermudez, that if anything in fact were turned over to Detective Bermudez, was turned over by Henry Stanley, his friend, and that, [fol. 574] he, Stanley, made the sale; that he, the defendant, had no part of this transaction under any circumstances and he never saw a sale take place.

It is useless, Ladies and Gentlemen, to go over certain things that I am quite sure that you will well recall, except to now say this, that the police record for conviction of this defendant of prior convictions is not proof, and I think I told you this, is not proof of guilt of this crime and that must be perfectly apparent to you, that the fact that the man had previously been convicted of

a crime is not proof of the guilt of the defendant for which he is charged; but it is an item that you may take into consideration in determining the believability and credibility of a witness. It is an item that you may take into consideration as to how much weight one would give to a witness under these circumstances, and when you take them, again, into the context of all of the circumstances.

I must at this particular time caution you, too, that sympathy would have no place in a trial of a lawsuit. [fol. 575] All of us are sympathetic and this is not going to be a determinative factor in the judgement that you are about to fulfill in the trial of this lawsuit. I may also say to you, in the course of the interrogation as to the statements purportedly given by the defendant to Mr. Facelle, which Mr. Facelle examined him about, these again, these were alleged to have been taken in January 8, 1966, and it was elicited in cross-examination that the defendant's recollection of having given these answers and having been asked these questions, he did not recall them as they were asked of him by Mr. Facelle. These questions and answers go to the weight and the credibility that you give to a witness' testimony. You may take this into consideration as to whether or not he, the defendant, or any person, had made a prior inconsistent statement, you may take that into consideration into determining how much weight you attach to a witness' testimony. How believable it becomes to you under all of the circumstances; but I caution you again that this is not proof of the defendant's guilt. This goes to the weight, believability of a witness' testimony.

[fol. 576] You will recall that the defendant denied under any circumstances having been in the business of pusher. He denied having ever stated that he was in the business in Connecticut and Yonkers and New Rochelle, and he denied that he had ever sold any drugs to the detective; and that he admitted that he was a drug addict; that he himself had used drugs, but he said I have not and I do not sell them. He accordingly denies these. He said that he had been importuned by the detective to seek drugs for him, but that he had told the detective that

there was a panic on, and that it was impossible for him to do anything about it.

Ladies and Gentlemen, if you were to find, and this is within the realm, and I am going to come to that in a moment, if you were to find that this defendant was the agent for Detective Bermudez in the purchasing of drugs, you realize that he would not be liable for this crime. You realize that one who acts as an agent for a prncipial and not be liable, but you would first have to find that he [fol. 577] was an agent and you may take into consideration, if you will on this particular point, the fact that the defendant says I never made any purchases, I was asked to make a purchase for him, I was never able to, under these circumstances. But I point this out to you that if a person is a agent, charged with the commission of a crime, he could not be convicted under those circumstances.

I have bounced over these facts and I am sure they will receive your very careful consideration.

What is it that we mean by the duty of the People to sustain the burden of proof beyond a reasonable doubt? Of course, you do know, this has been stated to you before. It can't be a fancy on your part, it can't be just a whimsical speculation, it can't be some idea that a person has, it doesn't mean beyond all certainty, because in life is beyond all certainty. And I am sure you well know that. It can't be a mechanism, by the way, Ladies and Gentlemen, that you can escape doing what may seem to be an unpleasant duty, and it doesn't mean a doubt in this sense of the word. It means that it must be a rea- [fol. 578] sonable doubt on the evidence as to a material fact. Let me take this back into context for you for a moment. It relates solely to the evidence, because you are going to pass upon evidence in this case, and it must be of doubt on a material fact that you could find in this evidence. There is a difference between my having a reasonable doubt on a thing and a reasonable doubt upon the evidence; so it must be a reasonable doubt founded upon the evidence in this case. Have the People failed in some area to satisfy you beyond a reasonable doubt that they have produced adequate, satisfactory evidence to sustain

their position? That is a rhetorical question, not a demand, Ladies and Gentlemen, at all, on my part, and it must be as to a material fact, and that material fact must play some part in the commission of the crime. For example, it would become immaterial as to whether it happened at 5:36½ or 5:35, if in fact it happened; or if in fact in the sequence of time certain things occurred. This is what I mean. And the material facts in this case that the People are duty-bound from the Law to [fol. 579] establish, are that: was there a narcotics sold? Was it sold at this time and place? Was it sold to Detective Bermudez? Do you believe him? These are the material facts. Was that substance that was sold, given or bartered, heroin? So a reasonable doubt, Ladies and Gentlemen, doesn't mean any doubt. It means a doubt, a reasonable doubt founded upon a evidence in a case as to a material fact.

What is the mental operation by which you visualize this? If after you look over and you review it in your jury room, as each individual, all the evidence, you find that you entertain a reasonable doubt, that the People have failed to establish their case, then Ladies and Gentlemen, your duty is to acquit this defendant. Send him home. It is a doubt that a person of reasonable intelligence can give some good reason for entertaining the doubt, if he is called upon to give a reason. Can you say to yourselves, I have a reasonable doubt, there is a flaw in here in this proof, size of it is immaterial. I have a reasonable doubt. Then the People have failed [fol. 580] to satisfy you beyond a reasonable doubt of the guilt of this defendant. You may take into consideration, too, the fact that I have isolated this as far as the People. You of course will consider, as I have said to you before, all of the evidence in this particular case.

Please note, too, if you will, the use of the word reasonable. We all know there are sceptics; they believe nothing. We all know there are credulous people who believe everything. The world is made up of this. What the Law operates in is a standard of a reasonable person and this is why in a jury of 12 people you seek to get a consensus. This doesn't mean that you must adopt your

neighbor's standard. But it means that in your deliberations in the jury room, you must not go into that jury room with a pre-conceived idea of the guilt of this defendant, or his innocence. You must be prepared to listen to arguments and discussions of your neighbors. This doesn't mean that you must change, but that as reasonable people, we entertain the views of other people. That [fol. 581] doesn't mean that we change, does it? That simply means that we are willing, in the performance of arriving at a fair and just conclusion, to give credence and respect to the citizens, the other people, on your talking of a reasonable area of doubt.

I said to you before, what is evidence? We have all talked about it here for several days. Everybody has talked about evidence. Facts, testimony, exhibits, they are all interchangeable, really. There are two types of evidence, Ladies and Gentlemen. One is direct evidence. That is what you see. You look across at the window, you are looking at it but if you were downstairs, and you didn't see a window, but you saw a light coming through, you could presume, couldn't you not, there would be a window on a certain given site, so there is circumstantial evidence, too. Circumstances that surround proof, and sometimes it is considered in the legal end of it, that circumstantial evidence is better than direct evidence, because the little small pieces of evidence, when you, if they exist, when you put them together in a [fol. 582] mosaic, make a much better and clearer picture than does direct evidence. So you have circumstances in this case of evidence surrounding this transaction, pass upon it. There is a rule of circumstantial evidence and that is this, that if the evidence is capable of two constructions, one is a construction of innocence or guilt, and ambivalent position, then you must resolve that in favor of the defendant. But if the circumstances point in but one direction and that is the guilt of the defendant, then under those circumstances, Ladies and Gentlemen, you must accept it. You must view it from this viewpoint and you must, so if upon arranging the facts in a case two constructions appear, the one that is most favorable to the defendant you have to take, under our system

of jurisprudence. But if it points in one direction only and that is the guilt of the defendant, if it is inconsistent with every reasonable hypothesis of innocence of the defendant, you are bound as jurors to accept this. This is what you are to take. So do not regard circumstantial [fol. 583] evidence circumspect, weigh it and test it in the light of all of the facts and circumstances in this case. So I must point out to you that circumstantial evidence must not be disregarded unless it fails to meet the test that I have given to you; and if it does, then you disregard it completely.

Let me say this to you, if you will, please. We have talked about evidence, rules of law. Now we will talk about witnesses. How does one weigh testimony? How does one view witnesses? You do not, Ladies and Gentlemen, substitute your judgment for theirs. You most assuredly do not substitute a version that you may set up in your own mind of events as you think they ought to be. You weigh the testimony.

Number of witnesses has nothing to do with it, Ladies and Gentlemen. Quality of the testimony is what you are looking for. How does a person appear when they are testifying before you? Are you impressed with their candor? Are you impressed with their ability to speak the truth? Was there hesitancy? Is there a lack of [fol. 584] candor? Are they evasive? These would be things that you would immediately pass upon in talking to people every day in the week, wouldn't you? The witnesses that sit before you, and I must say this to you that as we all sit here, People and the Defendant, we are all on an even par, there is no advantage, Ladies and Gentlemen, to this defendant or this People, to the District Attorney or to the Attorney for the Defendant. Fundamental fairness requires that everyone start off at an equal in a Courtroom. Now, you have a right, of course, to consider motive. You have a right to consider interest, you have a right to consider what interest does a person have in the outcome of the litigation. I say to you that in any criminal case, a defendant is an interested witness, as a matter of law. This doesn't brand him as a perjuror, Ladies and Gentlemen; this doesn't

brand him as a liar. It is merely an element that you may take into consideration in your deliberations in the jury room in weighing evidence that you have before you. Have I made this clear now in the long period of time [fol. 585] that we have been talking, that what you do is weigh the evidence. You don't weigh it with sympathy. You might love to do it; you don't love to do it with fear, you don't weigh it with prejudice. You weigh it as reasonable men and women in the performances of an important duty to the People of the State of New York and to this defendant who is on trial here. That is the way you weigh it. But, Ladies and Gentlemen, you don't leave your common sense, either, and go into limbo when you go into a jury room. You take in with you your every-day knowledge, you take in with you your dealings with other persons as standards that you utilize in testing this evidence.

If you were to find that a witness lied or that a witness had misrepresented a material fact, of course, Ladies and Gentlemen, under those circumstances you may disregard that portion that you consider to have been misrepresented. You most assuredly disregard all of the testimony of a witness if you find that they had lied. This is what you will do in every-day life. There is no great mystery about what I have just told to you. I [fol. 586] again must repeat, that you must not have any concern with an element of punishment. This is a function for the Court. If the defendant committed any of the acts that were complained of in this information, Ladies and Gentlemen, the consequences are his, not yours or mine.

Each juror, Ladies and Gentlemen, is entitled to his own opinion and I think I indicated to you before that you must not yield to the opinion of other jurors unless you are convinced that the reasoning that is utilized in your discussion persuades you that the People met the burden of proof. You will have to decide, each one of you for yourselves, and as I indicated to you, you must not permit any previous impression gathered in this case or from some other suit, of course, to in any way influence you in a fair or reasonable determination.

No other body, Ladies and Gentlemen, in our system has the task that you have. You have a responsibility under your oaths to fulfill. Most assuredly you do know this, if this defendant is innocent of crime for which he [fol. 587] is on trial here, he should not be convicted. He should be acquited. But most assuredly if he is guilty of the crime, he should be convicted. It is your function to determine the guilt or innocence of this defendant within the area that I have just mentioned to you, and this function should be discharged with courage, intelligence, loyalty and with the fullest responsibility to your obligations as jurors.

Mr. Foreman, it has been stated to you before that your function in this case will be to try and arrive at a unanimous verdict. This constitutes, under criminal law, all 12. Are there any exceptions, Gentlemen?

MR. PROJANSKY: I have one request to charge.

THE COURT: We will take any exceptions to what I have, sir.

MR. FACELLE: No exceptions.

MR. PROJANSKY: No exceptions.

THE COURT: Your request, Mr. Projansky, is what?

MR. PROJANSKY: Your Honor, I would like to request under Section 445 of the Code of Criminal Pro-
[fol. 588] cedure, charge the jury as to necessarily included lessor crimes, that if the jury find that the People have not proven all of the elements of the crime beyond a reasonable doubt, they may nevertheless convict the defendant of lesser crimes necessarily included within the crimes charged in the indictment, and that if the jury find that the defendant did not make a sale on the dates in question, but that he did then and there unlawfully possess heroin, they may convict him of that misdemeanor.

THE COURT: No, you may have an exception. You may have an exception. He is not charged with possession nor is there, under the facts and circumstances in this case, an issue which permits of the submission of the lesser charge in here. I will grant you an exception to it. Now, may I ask, in the presence of the defendant—

MR. FACELLE: Would Your Honor please?

THE COURT: I am sorry.

MR. FACELLE: I have a request. If Your Honor please, I will ask the Court charge the jury that they must render a verdict and make a finding on each of the [fol. 589] two counts independently and separately.

THE COURT: Yes, I will.

MR. FACELLE: Thank you.

THE COURT: I am sure that you recognize, as I specified, that there are two charges and you must pass upon both of these charges. This is what the request was.

MR. PROJANSKY: Your Honor, will you please charge the jury that there is no necessity that their findings, their verdicts as to the two counts be the same.

THE COURT: Yes, surely they may find. You may find the man not guilty of the count charging the sale on January 4th, and guilty of the count of January 6th. You may have any one of four combinations within the evidence. You recognize that, do you not? That there could be any one. You could acquit on both counts, you could find him guilty on both counts, then you may cross one to the other, this depends upon the results of your determination; and forgive me for not having explored it with you, but it seemed that as an intelligent jury I was [fol. 590] so sure that you recognized it. I didn't feel that I had to press it. May I ask from the defendant, at this time, is he prepared to permit, if the jury so calls for them, the submission to the jury of the exhibits?

MR. PROJANSKY: I have no objection, Your Honor, to the submission.

THE COURT: Mr. Foreman, in the event that you, in the course of the deliberations, want the exhibits, feel perfectly free to call for them and we will send them to you. Secondly, if you would find it desirable and necessary to have some portion of the testimony read or portion of the Law read, you do know that you could communicate this fact to the deputy sheriff who will be with you and we will be here for the purpose of supplying you with this information. Yes, Mr. Facelle?

MR. FACELLE: May I be presumptuous, Your Honor; may I ask that the Court advise that the jury—that the exhibits that they may call for are the exhibits in evidence. There have been references to exhibits for identification and reference to exhibits in evidence.

THE COURT: Yes, they may call for them, but [fol. 591] they won't get them unless they are in evidence. * * *

* * * *

(Recess at 5:32 p.m..)

(Request from jury marked Court's exhibit 8.)

(Jury returns to the Courtroom at 9:05 p.m. The defendant and both counsel are present.)

THE COURT: Mr. Foreman, I have the note which you have just sent to me to the effect that the jury as [fol. 596] arrived at a verdict on one count in the indictment, and that at the present time there is a disagreement in the jury on the second count. May I ask you now, and I shall ask you as to the first count in the indictment, and I think if you will recall I indicated to you that it was possible for you to arrive at a combination of verdicts in reference to the various counts in the indictment. May I ask you, without at this moment indicating as to the first count of the indictment, which charges the defendant Viven Harris with the sale of a narcotic on January 4, 1966, have you been able to arrive at a verdict on that count?

JURY FOREMAN: No, Your Honor.

THE COURT: May I ask you, have you been able, as to the second count of the indictment, which charges that the defendant on the 6th day of January, 1966, unlawfully bartered and sold a quantity of heroin, have you arrived at a verdict on that count?

JURY FOREMAN: Yes, Your Honor.

THE COURT: May I ask you, sir, is this a unani- [fol. 597] mous verdict?

JURY FOREMAN: It is, Your Honor.

THE COURT: May I ask you, sir, how do you find the defendant on the second count in the indictment?

JURY FOREMAN: Should I stand?

THE COURT: Yes, you may.

JURY FOREMAN: The jury finds the defendant guilty.

THE COURT: As charged in the indictment?

JURY FOREMAN: As charged.

THE COURT: Now at this time, on behalf of the defendant,—you may be seated, Mr. Foreman. On behalf of the defendant, I am going to poll the jury and this simply means to ask each and every member of the jury, as your name is read, would you please indicate whether or not you agree with the statement which has been made by your foreman as to the second count in the indictment.

(Whereupon the jurors were individually polled and their verdict was the same as that announced by the foreman.)

THE COURT: Mr. Foreman, may I ask you please, [fol. 598] would you indicate, do you feel after the long hours which you have spent that it would be impossible for you to arrive at a verdict or consensus of opinion in your jury on the first count?

JURY FOREMAN: I do not feel we could arrive at one.

THE COURT: And you do not feel that under the circumstances any longer deliberation may blend to a result in connection with the verdict?

JURY FOREMAN: I do not feel.

THE COURT: Of course you folks do know that no other jury would know any more about this case than you would, that all of the evidence that is available in the case is here before you, and undoubtedly it would be impossible to get a better jury than you Ladies and Gentlemen represent. But under the circumstances, I will find that there is a disagreement in the jury, with the consent of the defendant, on the first count.

MR. PROJANSKY: Yes, Your Honor, we'll consent to that.

THE COURT: And is that agreeable to the People? [fol. 599] MR. FACELLE: Yes, Your Honor.

THE COURT: Then I will accordingly discharge the jury after having rendered a verdict of guilty on the second count. * * *

* * * *

VOLUME III

COUNTY COURT : WESTCHESTER COUNTY

Indictment #50-66

THE PEOPLE OF THE STATE OF NEW YORK

—against—

VIVEN HARRIS, DEFENDANT

SENTENCE MINUTES

December 20, 1966
White Plains, New York

Before:

HON. ROBERT E. DEMPSEY, County Judge.

Appearances:

LEONARD RUBENFELD, District Attorney, Attorney for the People, County Courthouse, White Plains, New York

By: JAMES R. COWHEY, Esq., Of Counsel, Assistant District Attorney.

EARL J. McHUGH, Esq., Attorney for the Defendant, 120 Grand Street, White Plains, New York

* * * *

[fol. 9] * * * I feel that in the past record, in his conduct, that he has time to serve. It is the Judgment of the Court that he will be sentenced to the Sing Sing State's Prison for a term the minimum of which will be not less than 6 years and the maximum of which will not be more than 8 years.

MR. McHUGH: Eight years, Your Honor?

THE COURT: Yes.

* * * *

SECOND JUDICIAL DEPARTMENT

APPELLATE DIVISION

By BELDOCK, P.J.; CHRIST, BRENNAN, SAMUEL RABIN and MUNDER, JJ.

PEOPLE, &C., res, v. VIVEN HARRIS, ap—Judgment of the County Court, Westchester County, rendered Dec. 20, 1966, affirmed, Beldock, P.J., Brennan and Munder, JJ., concur, with the following separate memoranda:

Brennan, J.: The indictment, containing two counts, alleged that defendant committed the crime of selling a narcotic drug, by selling heroin on Jan. 4 and 6, 1966. The sales were to an undercover agent. On Jan. 7, 1966, defendant was arrested and within one hour he made a statement in the assistant district attorney's office. He was apprised of his privilege to remain silent and that anything he said might be used against him. He was then questioned, but prior to making any admissions said he would like to speak to an attorney. The assistant district attorney brought the questioning to a close, told defendant he had a right to counsel and asked him if he desired to speak to an attorney then. Defendant replied that he would "call tomorrow." He asked what the charges against him were and, upon being informed, volunteered the information that everybody in his area was selling narcotics. After this statement the assistant district attorney posed a few questions which defendant answered. Defendant said his answers were voluntary and it was his decision to talk after requesting counsel. No notice of an intention to use the statement as evidence was given by the People (Code Crim. Pro., 813-f). At the trial the undercover agent testified as to the transactions of Jan. 4 and 6. His testimony was corroborated in minor respects by another undercover agent. Defendant (who admitted at the trial to three prior convictions) testified on direct examination that he did not give the undercover agent drugs on Jan. 4, 1966; but on Jan. 6, 1966, he did go to a friend's home where he put baking

powder in two glassine envelopes and sold the latter as heroin to the agent.

On cross-examination the assistant district attorney read into evidence portions of defendant's statement of Jan. 7, 1966, solely to impeach defendant's credibility. Defense counsel objected on the ground that no pre-trial notice had been received and that the statement had been taken in violation of Miranda v. Arizona (384 U. S. 436). The court determined, after hearing argument, that the statement had been elicited without the full Miranda warnings and, therefore, could only be used as an instrument of impeachment. The gist of the portions read in the presence of the jury is twofold: (1) on Jan. 4, 1966, defendant acted as the undercover police officer's agent in obtaining narcotics and (2) on Jan. 6, 1966, defendant obtained narcotics from an unknown person outside a bar and then sold the drugs to the undercover agent in a bar. The court charged the jury that this statement went to the credibility of the witness and was "not proof of the defendant's guilt." Defense counsel in his summation uttered a similar admonition. The jury disagreed as to the count relating to Jan. 4, 1966, but found defendant guilty of the second count.

Section 813-f of the Code of Criminal Procedure provides that the People must give notice to the defendant before trial where they "*intend to offer* a confession or admission *in evidence*" (emphasis supplied); and section 813-g provides that "[i]f the motion [to suppress the statement] is granted, the confession or admission shall not be admissible *in evidence*" (emphasis supplied). It has been held that the failure to give the prescribed notice deprives the People of the evidentiary use of the statement when it is offered in evidence (People v. Schwartz, 30 A. D. 2d 385, 388). The purpose of the statute is to enable the defendant to prove before trial that the statement was obtained involuntarily (People v. Schwartz, supra; People v. Huntley, 15 N. Y. 2d 72). At bar the statement was marked in evidence at the suggestion of the trial judge and upon consent of respective counsel, but only to enable defense counsel to peruse it, and it was not made available to the jury. Conse-

quently, it is readily apparent that the statement was not put in evidence in the truest sense of that word. Accordingly, since the aforementioned statutes are directed at *evidence* in its conventional form, we have concluded that no pre-trial notice is required as to statements used solely for impeachment.

On this appeal the district attorney has conceded that the statement was obtained in violation of Miranda and would have been suppressed had he attempted to use it as evidence-in-chief. We adopt his concession but point out that, under the circumstances herein, the Miranda warnings given herein might have been found sufficient by the trial judge after a Huntley (People v. Huntley, supra) hearing (see People v. Post, 23 N. Y. 2d 157; United States v. Fisher, 387 F. 2d 165, cert. den. 390 U. S. 953; United States v. Messina, 388 F. 2d 393, cert. den. 390 U. S. 1026).

Nevertheless, the district attorney argues that People v. Kulis (18 N. Y. 2d 318) sustains the use of such an illegal statement for the purpose of impeachment. In that case the Court of Appeals held that a statement obtained in violation of Escobedo v. Illinois (378 U. S. 478) can be used to impeach a defendant's testimony given on direct examination. The rule of the Kulis case, and of Walder v. United States (347 U. S. 62) which it purported to follow, is that a tainted statement (or the fruits thereof) is admissible solely to impeach a defendant's direct testimony on collateral matters not directly related to the crime for which he was indicted (see People v. Schwartz, 30 A. D. 2d 385, supra; People v. Johnson, 30 A. D. 2d 575; People v. Quick, 30 A. D. 2d 561; People v. Dixon, 27 A. D. 2d 740; United States v. Curry, 358 F. 2d 904, cert. den. 385 U. S. 873; Bailey v. United States, 328 F. 2d 542; Tate v. United States, 283 F. 2d 377).

At Bar it is apparent that the statement pertaining to the events of Jan. 6, 1966, when read before the jury, violated the holdings in Kulis-Walder. However, it is now well settled that the "harmless-constitutional-error rule" does not mandate reversal where the appellate court concludes that the error was harmless beyond a reason-

able doubt (Chapman v. Calif., 386 U. S. 18, 22). This means that the error is harmless if it could not in any event affect the outcome and did not play a "meaningful role" in the case (People v. Savino, 22 N. Y. 2d 732, 733; People v. Ross, 429 P. 2d 606). In an analogous factual context our Court of Appeals has recently said "it is difficult to conclude that the errors were of sufficient consequence to merit a new trial" (People v. Miles, 23 N. Y. 2d 527 [dec. Jan. 16, 1969]). The court therein further observed that "the impropriety is confined to an incidental part of the case and on a trial in which the proof was overwhelming in establishing the guilt of defendants. Indeed, the very use and introduction of the pre-trial statement was the result of the able prosecutor 'overtrying' his case." These observations are appropriately applicable to the case at Bar and we have concluded that, beyond a reasonable doubt, the jury could not, minus the error, have determined the case otherwise and, therefore, the error was harmless.

Defendant argues that the Miranda decision overrules Kulis or, as in the case at Bar, where Miranda violations occur, Kulis does not apply (see cases collated in 13 New York Law Forum 146, 158-162; Pitler, "The Fruit of the Poisonous Tree," 56 Calif. L. Rev. 579, 630-636). The United States Supreme Court has not yet passed upon the question (cf. Harrison v. United States, 392 U. S. 219, dissenting op. at p. 234) and in Kulis itself the dissenters observed that Miranda governed (see People v. Johnson, 30 A. D. 2d 575, supra, dissenting memo., pp. 575-576; cf. People v. Shivers, 21 N. Y. 2d 118, 122). Until the question has been passed upon by our Court of Appeals we decline to adopt defendant's argument and depart from the rationale of Kulis. Accordingly, we are of the opinion that a statement obtained in violation of a defendant's Miranda rights is admissible solely for impeachment purposes (see People v. Miles, 23 N. Y. 2d ——, supra, [dec. Jan. 16, 1969]).

Beldock, P.J., and *Munder, J.*—Because of our opinion in People v. Schwartz (30 A. D. 2d 385) we consider ourselves constrained to agree with the theory that an illegally obtained statement may be used to impeach a

defendant's direct testimony only on collateral matters not directly related to the crime charged against him. We agree that section 813-f of the Code of Criminal Procedure, regarding the notice that must be given by the People if it is intended to offer such a statement in evidence as a part of the People's case, has no application if the statement is to be used solely for impeachment purposes. If a crime has not been otherwise proved, however, such a statement may not form the basis for a conviction (People v. Marcano, N. Y. L. J., June 20, 1968, p. 2, col. 2 [App. Term, First Dept.]). But where it is used only to challenge credibility, and a proper charge by the court keeps it in true perspectives, we do not believe the familiar evidentiary rule should be so diluted. We think that any testimony given by a defendant as a witness in his own behalf, directly related or collateral to the crime charged, is subject to contradiction through his prior inconsistent statements, not to establish the truth of the prior statements but to impeach his credibility and thereby discredit his testimony (cf. Richardson on Evidence [9th ed.], sec. 513).

Christ, J., dissents and votes to reverse the judgment and grant a new trial, with the following memorandum in which Rabin, J. concurs: Defendant was charged in two counts with selling heroin to an undercover police officer on Jan. 4, and Jan. 6, 1966. The trial essentially involved a test of credibility between the undercover agent and defendant. The jury was unable to agree as to the alleged sale on Jan. 4, although the undercover agent testified unequivocally that defendant sold him a bag of white powder on that date and the police chemist testified that the bag contained heroin. Defendant denied this alleged sale. It seems reasonable to infer from the jury's disagreement on the Jan. 4 charge that they may have had some reservations about the officer's veracity.

As to the Jan. 6 charge, the undercover agent testified that defendant sold him two "decks" of heroin on that date. Defendant testified that the agent kept asking for drugs that night and that defendant went to a friend's apartment, filled two empty glassine envelopes with baking powder and gave them to the agent for $12.

The prosecution was then permitted to impeach defendant's credibility by the use of a statement concededly inadmissible under Miranda v. Arizona (384 U. S. 436) and which severely undermined his testimony as to matters directly related to the crime charged (People v. Schwartz, 30 A. D. 2d 385, 388; People v. Johnson, 30 A. D. 2d 575; cf. People v. Shivers, 21 N. Y. 2d 118, 122). There can be no mistake about the effect of this use of the statement. It tended "to prove guilt by implication" and was "incriminating in any meaningful sense of the word" (Miranda v. Arizona, supra, p. 477). Defendant was convicted on the second count and sentenced to six to eight years in prison.

Under the circumstances outlined above, I cannot agree that this error of constitutional dimension was "harmless beyond a reasonable doubt" (Chapman v. California, 386 U. S. 18, 24). An error is not harmless if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction" (Fahy v. Connecticut, 375 U. S. 85, 86-87). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (Chapman v. California, supra). Surely it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the Jan. 4 charge (cf. Anderson v. Nelson, 390 U. S. 523, 525). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's. The judgment should be reversed and a new trial granted.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 17, 1969

HON. GEORGE J. BELDOCK, *Presiding Justice*
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. SAMUEL RABIN
HON. FRED J. MUNDER
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

VIVEN HARRIS, APPELLANT

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION

In the above entitled action, the above named Viven Harris, defendant in this action, having appealed to this court from a judgment of the County Court, Westchester County, rendered December 20, 1966; and the said appeal having been submitted by Joel Martin Aurnou, Esq., of counsel for the appellant, and by James J. Duggan, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's Opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby affirmed.

Beldock, P.J., Brennan and Munder, JJ., concur, with separate memoranda.

Christ, J., and Rabin, J., dissent and vote to reverse the judgment and grant a new trial, with dissenting memorandum by Christ, J., in which Rabin, J., concurs.

Enter:

HERMAN M. POGUL
Clerk of the
Appellate Division

STATE OF NEW YORK
COURT OF APPEALS

2. No. 254. 69

THE PEOPLE &C., RESPONDENT

vs.

VIVEN HARRIS, APPELLANT

OPINION

PER CURIAM:

On this appeal from a judgment convicting the defendant of selling narcotics, the defendant raises two points.

The first concerns a statement obtained from him after his arrest and under circumstances which concededly violated the requirements prescribed by the Supreme Court in *Miranda* v. *Arizona* (384 U. S. 436). In its direct case, the People did not offer the statement in evidence. On cross-examination, however, and over the defendant's objection, the statement was employed extensively by the prosecutor in cross-examining the defendant who had taken the witness stand in his own defense. The statement was at complete variance with the account given by the defendant on direct examination although it was no more inculpatory than his direct testimony. Such use of the statement for purposes of impeachment is authorized by our decision in *People* v. *Kulis* (18 N Y 2d 318), to which we adhere.

The defendant's second contention is that use of the statement should, in any event, be barred because the People failed to comply with section 813-f of the Code of Criminal Procedure which provides that, "where the people intend to offer a confession or admission in evidence * * * the people must * * * give written notice of such intention to the defendant". We agree with the decision of the Appellate Division herein—and not with its later, seemingly inconsistent, position in *People* v.

Torres (32 A D 2d ——, N.Y.L.J., June 12, 1969, p. 15, col. 8)—that section 813-f is not applicable. Section 813-f is not intended as a discovery device; its function—as the very language of the statute itself indicates (see tit. II-C of Part VI, Code Crim. Pro.)—is to afford a defendant an opportunity for a hearing under section 813-g to determine the voluntariness of his confession or admission. Accordingly, when the prosecution neither offers nor plans to offer a statement in evidence against the defendant, the section in question is just not applicable. Moreover, where, as in the present case, a statement obtained in violation of *Miranda* is used solely for impeachment purposes, no purpose would be served by requiring compliance with section 813-f, and the People were not obligated to furnish the notice there prescribed.

The judgment should be affirmed.

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

VIVEN HARRIS, DEFENDANT-APPELLANT

FULD, Ch. J. (concurring):

Some three years ago, the court held in *People* v. *Kulis* (18 N Y 2d 318) that, although a statement concededly taken from a defendant in violation of his constitutional rights cannot be received in evidence against him, it may, nevertheless, be used for purposes of cross-examining him if he takes the witness stand and testifies in his own defense. This seemed wrong to Judge Keating and to me, and we dissented (18 N Y 2d, at pp. 323-324) on the ground that to allow the use of an illegally obtained confession or statement even for impeachment purposes was violative of a court's responsibility to preserve and maintain basic constitutional rights. Not alone a need to deter official misconduct but a regard for "the imperative of judicial integrity" (*Elkins* v. *United States*, 364 U.S. 206, 222) mandates that a confession which was unlawfully taken from a defendant should not be used for any purpose.

I still believe that this is so, and I am confirmed in that view by the fact that, since the *Kulis* decision was handed down, at least a dozen tribunals, including the highest courts of three states and six Federal Courts of Appeals, have actually repudiated the conclusion reached in *Kulis* and held an illegally procured statement completely unusable.[1] However, in light of the majority's present determination to adhere to the decision in *People*

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[1] See *State* v. *Brewton* (247 Or. 241, cert. den., 387 U.S. 943 [1967]); *Commonwealth* v. *Padgett* (428 Pa. 229 [1968]); *Gaertner* v. *State* (35 Wis 2d 159 [1968]); *Proctor* v. *United States* (404 F 2d 819 [D.C. Cir. 1968]); *United States* v. *Fox* (403 F 2d 97 [2d Cir., 1968]); *United States* v. *Pinto* (394 F 2d 470 [3d Cir., 1968]); *Breedlove* v. *Beto* (404 F 2d 1019 [5th Cir., 1968]); *Groshart* v. *United States*, 392 F 2d 172 [9th Cir., 1967]); *Wheeler*

v. *Kulis* (18 N Y 2d 318, *supra*), I deem myself constrained to cast my vote for an affirmance.

• • • •

Judgment affirmed. Opinion Per Curiam. Concur: Burke, Scileppi, Bergan, Breitel and Jasen, JJ.; and Fuld, Ch. J., in a separate opinion.

---

v. *United States*, 382 F 2d 998 [10th Cir., 1967]); *United States* v. *Prebish* (290 F. Supp. 268, 273-275 [D.C. Fla. 1968]); *United States* v. *Birrell* (276 F. Supp. 798, 817 [D.C. S.D. N.Y., 1967]); cf. *United States* v. *Armetta* (378 F 2d 658, 661-662 [2d Cir., 1967]).

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of July in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD
Chief Judge, Presiding
RAYMOND J. CANNON
Clerk

REMITTITUR JULY 2, 1969

2. No. 254. 69

THE PEOPLE &C., RESPONDENT

vs.

VIVEN HARRIS, APPELLANT

BE IT REMEMBERED, That on the 13th day of May in the year of our Lord one thousand nine hundred and sixty-nine, Viven Harris, the appellant—in this cause, came here unto the Court of Appeals, by Joel Martin Aurnou, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Carl A. Vergari, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Joel Martin Aurnou, of counsel for the appellant—, and by Mr. James J. Duggan, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Westchester County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Westchester County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, July 2, 1969

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk

[SEAL]

SIR.

PLEASE TAKE NOTICE that the within is a true copy of an order duly entered in the Office of the Clerk of Westchester County on the 8th day of August, 1969.

Dated: August 11, 1969.

Yours, etc.

CARL A. VERGARI
District Attorney of
Westchester County
Office and Post Office Address:
Court House
White Plains, N. Y.

TO Joel Martin Aurnou, Esq.
Attorney for Appellant

SIR:

PLEASE TAKE NOTICE that the within order will be presented for settlement and signature to the Hon. ....., one of the judges of the within named Court at the Courthouse, White Plains, N. Y. at 10 A.M. on the ..... day of ....., 19....

Dated: ....., 19....

Yours, etc.

District Attorney of
Westchester County
Office and Post Office Address
Court House
White Plains, N. Y.

TO ....., Esq.
Attorney for Defendant

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

against

VIVEN HARRIS, APPELLANT

REMITTITUR

CARL A. VERGARI
District Attorney of Westchester County

Office and Post Office Address:
Court House - - - White Plains, N. Y.

TO Joel Martin Aurnou, Esq.
Attorney for Defendant

COUNTY COURT : COUNTY OF WESTCHESTER

Indictment No. 50/1966

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF

—against—

VIVEN HARRIS, DEFENDANT

ORDER

A motion having been made by JOEL MARTIN AURNOU, ESQ., for an Order dismissing the first count of the indictment herein pursuant to Section 66A of the Code of Criminal Procedure, Section 8 of the Code of Criminal Procedure, Section 12 of the Civil Rights Law, and the Sixth Amendment to the Constitution of the United States, and upon reading and filing the Notice of Motion and Affirmation of JOEL MARTIN AURNOU, ESQ., both dated the 14th day of May, 1969, and the Affidavit in Opposition of JAMES J. DUGGAN, sworn to June 10, 1969, and the Reply Affirmation of JOEL MARTIN AURNOU, affirmed the 11th day of June, 1969, together with due proof of service thereof, and after hearing counsel in open Court and after due deliberation, this Court having rendered its decision in writing,

NOW, upon motion of JOEL MARTIN AURNOU, it is

ORDERED, that the motion be and the same hereby is granted and the first count of indictment No. 50/1966 be and the same hereby is dismissed with prejudice.

ORDER signed this 31 day of July, 1969, at White Plains, New York.

ENTER,

/s/ George Beldock
J.C.C.

SUPREME COURT OF THE UNITED STATES

No. 1022 Misc., October Term, 1969

VIVEN HARRIS, PETITIONER

v.

NEW YORK

On petition for writ of Certiorari to the Court of Appeals of the State of New York.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1635 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 1, 1970

Mr. Justice Marshall took no part in the consideration or decision of this motion and petition.

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FILE COPY

FILED
OCT 25 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969-70

PETITION NOT PRINTED No. [redacted]. 206

VIVEN HARRIS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL A. VERGARI,
District Attorney of
Westchester County,
Court House,
White Plains,
New York 10601.

914 761—1144

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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STATUTES

New York Code of Criminal Procedure

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1022

VIVEN HARRIS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in oppositon to the captioned petition for a writ of certiorari.

Questions Presented

The following questions are presented by this appeal:

(1) Was the use of the petitioner's statement properly utilized to impeach his credibility when he testified in his own defense even though the statement would have been inadmissible on the prosecution's direct case?

(2) Are the petitioner's constitutional rights violated when he is not warned pursuant to the provisions of the New York Code of Criminal Procedure § 813-f, that the prosecutor intends to offer a confession or admission into evidence when the prosecutor has no such intention, although he later uses such admission to impeach the petitioner's credibility on cross-examination?

Statement of the Case

On the whole, the petitioner has presented to the Court a concise and accurate statement of the facts. Although we do not in every instance agree with the implications he draws from those facts, we will nevertheless be bound by the facts as he has set them forth.

POINT I

The use to which the petitioner's statement was put was eminently correct and proper.

The Court may decide in this case that *Walder* v. *United States,* 347 U. S. 62, is no longer good law. If it does, then, of course, the rationale of *People* v. *Kulis,* 18 N. Y. 2d 318, depending, as it does, on *Walder* will no longer be valid, and this case now before the Court is indefensible, because in its turn it depends completely on both *Walder* and *Kulis.* As a matter of fact, the New York Court of Appeals has adopted the phrase "the *Kulis-Walder* rule" to describe the principle, *People* v. *Miles,* 23 N. Y. 2d 527, 544. Our objective, then, must be to demonstrate to this Court that *Walder* is still a viable, worthwhile and functional rule of law.

In *Walder,* the defendant was arrested in 1950 and charged with the possession of heroin. The District Court, however, on an appropriate motion, held that the heroin

which formed the basis of the charge had been seized unlawfully and suppressed it. Thereafter, the Government moved for the dismissal of the case, and that was done. Almost two years later, he was again charged with violating the narcotics laws, and when the case went to trial he testified in his own defense. He testified that he had never purchased, sold, or possessed any narcotics, and over his attorney's objection the Government was permitted to cross-examine him about the heroin seized from him in 1950. In the face of his adamant denial that narcotics had been taken from him at that time, a denial squarely contradicted by his 1950 affidavit in support of the motion to suppress, the Government was permitted, again over objection, to elicit the testimony on rebuttal of one of the officers who had seized the narcotic in 1950 and the chemist who analyzed and identified it as such. This Court affirmed the ensuing conviction.

In the present case, as has been pointed out, a statement which would have been inadmissible on the authority of *Miranda* v. *Arizona*, 384 U. S. 436, had it been offered in the People's direct case was, for that reason, not offered on the direct case. Rather, it was held back, and when the petitioner testified in his own defense he made statements which were at significant variance with that statement, and at that point only, and for the first time, he was cross-examined by the prosecutor who asked him, a question at a time, whether he recalled having been asked a given question from the statement and having given such and such answer. He consistently denied familiarity with both question and answer, and to a very large extent, therefore, he, as much as the prosecutor, determined the scope of the impeachment the statement was used to provide.

The respondent would respectfully urge upon this Court that its failure to affirm the instant case is not only a complete repudiation of *United States* v. *Walder, supra,* but, more, a statement that *Walder* never was good law. To

begin with, we know that before *Walder,* United States Government agents were prohibited from conducting unlawful searches and seizures upon pain of having such evidence suppressed and rendered of no value to them, *United States* v. *Jeffers,* 342 U. S. 48. Yet little more than two years after *Jeffers, Walder* was decided, and in view of the proximity in time of the two cases there seems no option but to believe that this Court deliberately endorsed the use to impeach credibility of unconstitutionally secured evidence.

Turning, then, to the use of statements to impeach a defendant's credibility rather than tangible evidence, one comes to that line of cases exemplified by *United States* v. *Curry,* 358 F. 2d 904, which decision is in all ways faithful to the *Walder* precept. It deserved this Court's endorsement, and it received it in the form of a denial of certiorari, *Curry* v. *United States,* 385 U. S. 873. We make free to say that it deserved such endorsement, because both cases exemplify the same rule: unconstitutionally secured evidence is proscribed, except for purposes of impeachment, and that precept governs, whether the evidence is acquired in violation of the Fourth Amendment (*Walder*) or the Fifth (*Curry*).

Then this Court decided *Miranda* v. *Arizona, supra,* and beginning with *Groshart* v. *United States,* 392 F. 2d 172, a great many of the Federal Courts of Appeals and several of the highest courts of the states started an unceremonious, if not headlong, retreat away from the eminently sound logic of *Curry* towards the dictum expressed in *Miranda,* that evidence, even though contained in exculpatory statements, was inadmissible against the defendant. Where we take issue with this point of view is in the interpretation of *Miranda.* It is our submission to the Court that *Miranda* represents simply a new and heightened gauge of voluntariness. The *Mallory* rule (*Mallory* v. *United States,* 354 U. S. 449) and others setting standards which must be achieved

to hold a confession voluntary remain in force. They have only been joined by the *Miranda* rule which establishes additional standards which must be met before a confession may be deemed voluntary. If these and the other standards are not met, then, of course, any confession which results in that situation is involuntary and may not be used against the defendant.

In that view of the matter, there is no valid point of distinction between a pre-*Miranda* and a post-*Miranda* statement for the end result of any inquiry into each will be a determination that it is or is not voluntary and, as a necessary adjunct to that, an adjudication that it is admissible or inadmissible against the defendant. But having come to that evaluation of it, the trial court is in the same fix as was the trial court in *Curry:* may an involuntary statement, one, by definition, secured by means of the violation of his Fifth Amendment privileges, be used to impeach the defendant? *Curry* followed *Walder,* but the *Groshart* Court, by following *Miranda* and coming to a divergent result, has in effect said that there is some special mystique which attaches to an oral or written statement by reason of the *Miranda* dictum (which, of course, has no application to physical evidence) which makes the statement and the tangible evidence distinguishable and permits the use of the latter for impeachment purposes but forbids the use of the former.

The United States Court of Appeals for the Second Circuit recognized the dilemma thus presented in *United States* v. *Fox,* 403 F. 2d 97, and of it the Court said:

> "We express no view on the continued viability of *Walder* on its facts, but we are clear that in the light of *Miranda* it is no longer controlling in cases like that at bar." p. 101, footnotes omitted.

The objection to the *Walder-Miranda* conflict more bluntly stated is that, for so long as both continue to be authori-

tative, there will remain this vast disproportion in the extent to which the rights of an individual are enforced under the Fourth Amendment as opposed to the Fifth. That this lopsidedness ought not to be permitted to go on hardly has to be stated, but the question then becomes that of which to choose, the *Walder* holding or the *Miranda* dictum.

Critics of the *Walder* doctrine, and among them the instant petitioner, decry the fact that it inhibits their right to testify in their own defense. It simply doesn't, however. Certainly it prohibits their presentation to the court of a *perjurious* defense, but that, despite their disapprobation, is not a bad thing. The only defendant who has anything to fear from *Walder* is the one who proposes to take the witness stand and lie. The ironic thing is that if he even tells the same lies as he told in the statement (and we have never seen one without a few) it can't be used against him, even for impeachment purposes. The person cut most deeply by *Walder* is the defendant who moulds and remoulds his story to make it most completely responsive to the prosecution's case.

Neither is the factor of incrimination left in the case if *Walder* is followed, because, as was done in *Walder* and as was done here, it is carefully charged out of the case by the Court. The jury is told firmly and unmistakably that they may not consider the impeaching evidence against the defendant but may only use it in assessing his credibility. *Miranda,* on the other hand, uses the concept of incrimination as the very touchstone of its entire thesis and rationale. The opening paragraph of the opinion, the keynote of the whole thing, is:

> "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting in-

dividuals for crime. More specifically, we deal with the *admissibility of statements* obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to *incriminate* himself." *Miranda* v. *Arizona*, *supra*, p. 439, emphasis added.

Consequently, if admissibility and incrimination are the hallmarks of *Miranda*, then there would certainly appear to be no mandate that it be applied to a situation in which a statement is neither admitted nor incriminating.

Finally, and much in the same vein, if one statement is to be admissible and incriminating, and another is to be inadmissible and non-incriminating, then there is a certain amount of good sense and sound policy in distinguishing between the methods by which they are secured. Certainly the former calls for more highly sophisticated safeguards than does the latter, and this consideration alone seems to recommend that the discriminating standards of *Miranda* as to the former type ought to be markedly relaxed as to the latter.

One final reason why, it is submitted, this present statement was properly utilized is the fact that when it was secured it was perfectly proper and lawful, because it was made by the petitioner before the decision in *Miranda*. As a matter of fact, it even conformed to the *Miranda* requirements in all save one particular; the petitioner was not advised that if he could not afford an attorney, one would be furnished for him without charge. It was not utilized at the trial of the case because *Johnson* v. *New Jersey*, 384 U. S. 719, fixed the application of *Miranda* to trials begun after June 13, 1966. Consequently, when the statement was taken in January of 1966, it was admissible, and it remained so for the next following five months until *Miranda*

was decided. Since *Johnson, supra,* the Court has decided *Stovall* v. *Denno,* 388 U. S. 293, and *Desist* v. *United States,* 394 U. S. 244, and in each of these has established as the cutoff date, the date the prohibited conduct was engaged in. If *Johnson* had adopted the same standard, which the Court has since suggested is a better one, *Jenkins* v. *Delaware,* —— U. S. ——, 89 S. Ct. 1677, 1680, n. 7, then this present statement would have retained its initial validity, and this whole problem would never have arisen.

POINT II

The Court of Appeals ruled correctly that no pretrial hearing on the voluntariness of the statement was necessary.

This Court's ruling in *Jackson* v. *Denno,* 378 U. S. 368, wrought a radical change in New York in the manner in which the voluntariness of a confession was decided, because prior to that time no pretrial adjudication of that question was possible. In obedience to the mandate of that opinion, the New York Court of Appeals thereafter decided *People* v. *Huntley,* 15 N. Y. 2d 72, and in that case set down the general procedure by which *Jackson* could most effectively be implemented. At the following session of the New York State Legislature, the *Huntley* procedure was adopted almost without change and became Sections 813-f, 813-g, 813-h, and 813-i of the New York Code of Criminal Procedure, effective July 16, 1965. Section 813-f, with which we are here specifically concerned, reads:

> § 813-f. *Confessions and admissions; notice before use.* In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel.

It is the petitioner's argument that the prosecutor was compelled by this section to serve notice upon him in advance of trial so that the question of the voluntariness of the statement he gave to an assistant district attorney could be adjudicated. This section, it is submitted, has no relevance whatsoever to this case. To excerpt the operable language of the section, we see that such notification as the petitioner now claims entitlement to is necessary

> ". . . where the people intend to offer a confession or admission in evidence . . ."

In this case, the People were debarred from offering this statement in evidence by the then newly enunciated rule in *Miranda* v. *Arizona, supra.* In consequence, there wasn't, because there couldn't have been, an intention on the part of the People so to offer the statement, and as a necessary result of that fact, Section 813-f just did not apply. The statement, but for the entirely fortuitous fact that the petitioner testified, would never have become a part of the case. Even when he did testify, the statement was not admitted into evidence, at least in the conventional sense. It was marked as evidence, but only to preserve its identity for the appellate courts, and it was in all other respects treated as an exhibit for identification (cf. Petition, p. 5, ¶ 2).

Even in the long range view of the question and leaving aside the narrower ground that the wording of Section 813-f did not compel prior notice concerning the statement, such notice would have been a futile gesture. If we suppose that proper notice had been given, it is reasonable to believe, in the light of his present position, that the petitioner would have demanded the hearing required by the New York Code of Criminal Procedure, § 813-g. Without doubt that hearing would have been conducted, and, equally without doubt, the statement would have been ruled involuntary and hence inadmissible at the trial, because, as we

have already pointed out, it was deficient in terms of *Miranda.*

However, without having had recourse to that judicial process, the District Attorney's Office, because the defect is a glaring one, came to precisely the same conclusion, that it was involuntary and inadmissible, and of his own authority the District Attorney directed that it be so dealt with. As we have pointed out repeatedly, no allusion was made to it in the prosecution's direct case, and it was only when the petitioner testified that the statement re-entered the case.

As we attempted to demonstrate to the Court at Point I, *supra,* as long as *United States* v. *Walder, supra,* is viable law, the statement, even though inadmissible, is nonetheless a proper vehicle for the impeachment of the petitioner. In that frame of reference, it is wholly inconsequential whether its inadmissibility is ascertained and announced by a court or that conclusion is arrived at and adhered to by the prosecutor.

It is therefore submitted that from any point of view the petitioner was neither entitled to nor prejudiced by the absence of the Section 813-f notification.

POINT III

The petition should be denied.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of Westchester County.

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

October 22, 1969.

FILE COPY

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF FOR PETITIONER

JOEL MARTIN AURNOU
One North Broadway
White Plains, New York
Attorney for Petitioner,
Viven Harris

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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Other Authorities:

Annot. Impeachment of accused as witness by use of involuntary or not properly qualified confession, 89 ALR 2d 478 (1963) 10-11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions in the New York Court of Appeals are printed at 25 N.Y. 2d 175 (1969) (A. 113-16).*

The opinions at the Appellate Division, 2d Department, are printed at 31 App. Div., 2d 828 (1969) (A. 106-11).

The Trial Court rendered no written opinion.

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*(A. ___) Denotes Appendix; (R. ___) Denotes Record.

JURISDICTION

The affirming of petitioner's conviction by the New York Court of Appeals is a determination by the highest state court in which a decision could be had. The jurisdiction of this Court is invoked under 28 *U.S.C.* section 1257(3), petitioner claiming rights, privileges, and immunities under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATUTES INVOLVED

CODE OF CRIMINAL PROCEDURE

SECTION 813-f. CONFESSIONS AND ADMISSIONS; NOTICE BEFORE USE. In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel. (L 1965, ch 846, effective July 16, 1965.)

SECTION 813-g. THE MOTION IN GENERAL.- A person claiming to be aggrieved by an involuntary confession or admission may move for the suppression of such confession or admission from use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the confession or admission shall not be admissible in evidence in any criminal proceeding against the moving party. The order granting such motion may be reviewed on appeal.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is pre-

dicted upon a plea of guilty. (L. 1965, ch. 846, effective July 16, 1965)

QUESTIONS PRESENTED

1. Whether the impeachment use of defendant's concededly unconstitutionally obtained statement violated petitioner's rights under the Fifth (self-incrimination), Sixth (effective assistance of counsel), and Fourteenth (due process) Amendments to the United States Constitution?

2. Whether the *interpretation of and application to petitioner* of section 813-f of the New York Code of Criminal Procedure *by the New York Court of Appeals* violated petitioner's due process rights under the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Petitioner was charged in a two count indictment (A. 17) with two sales of a narcotic drug occurring on January 4, and 6, 1966. After trial, the jury convicted petitioner on the second count only. It was unable to reach a verdict as to the first count (A. 103-04) which was later dismissed by the court for lack of prosecution (A. 121).

On behalf of the prosecution, Detective Bermudez, who operated undercover in the City of New Rochelle, testified that he made two purchases of a narcotic drug from petitioner on January 4th and 6th of 1966. A police chemist testified as to each date that the powder contained at least traces of a narcotic drug (no quantitative tests were made). Detective Bermudez's partner, Detective Parks, confirmed only insignificant details of Detective Bermudez' testimony and did not witness either of the alleged sales. No other witness testified against petitioner.

Taking the stand in his own behalf petitioner rebutted the Bermudez testimony. He denied any sale at all on the 4th of January, 1966. (A. 24, 25, 40) He also testified that

Bermudez had been given baking soda by his friend in two discarded glassine envelopes on the 6th day of January, 1966. (A. 30-31) His direct testimony contained no mention of any post-arrest statement. (A. 19-35) In an attempt to minimize petitioner's testimony the prosecutor deliberatedly resorted to cross-examination by the impeachment use of a concededly unconstitutionally obtained statement. (A. 57-65)

As to each count, the jury was obliged to resolve the conflicting versions given by petitioner and Bermudez. The outcome of the trial depended directly and solely upon the credibility accorded these two witnesses by the jury.

The illegal statement was obtained in the following manner: On the day after the second alleged sale, petitioner was taken into custody and interrogated at the District Attorney's office. Petitioner was 23 years old with a tenth grade education (A. 15), indigent, addicted (A. 23) and suffering from lack of drugs (A. 59) and possibly from the after effects of a serious accident (A. 64). In addition, the statement in question itself discloses that petitioner was interrogated off the record prior to the recorded statement (A. 74), at which time he received no advice whatever of his rights according to the trial Assistant District Attorney, Mr. Facelle (A. 66 at Fol. 462) who was the same Assistant District Attorney who took petitioner's statement (A. 72). Thereafter, his stenographic statement, unsigned, was taken down despite his request for counsel and his reluctance to talk in the presence of the stenographer. (A. 74) His statement was marked as People's Exhibit 6 for Identification (A. 65) and later in evidence (R. 541).[1] The contents of petitioners statement was virtually completely disclosed to the jury by the prosecutor who read from the document in his hand (A. 57) extensively in his oral cross-examination.

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[1]Petitioner concedes that the statement was marked in evidence by the trial court solely to preserve it as part of the record on appeal and that the statement was not physically submitted to the jury on paper.

He thus conveyed verbatim the contents of both questions and answers of substantially the entire statement (A. 57-65). It is conceded that the jury convicted on the second count solely by reason of the illegally obtained statement which was particularly prejudicial as to that count.[2]

As to count one (January 4, 1966) the statement contradicted petitioner's direct testimony as to the alleged offense itself and not as to collateral matters (A. 58). However, it was not severely damaging since it presented petitioner only as an agent (of Detective Bermudez) who received no benefit for himself, and the court charged the jury that if defendant acted only as an agent for the detective, he would not be liable for the crime (A. 96). However, as to the second count, (January 6, 1966), on which he was convicted, petitioner's statement was particularly directly incriminating. His trial testimony was that he and a friend had given Detective Bermudez baking soda in order to "beat him" out of $12.00 (A. 30). The statement[3] as disclosed to the jury (A. 62) indicated that petitioner had gotten not only the $12.00 but also a "teste" or half bag of heroin, which would have been of no value whatever to petitioner if the bags contained baking soda. The statement as introduced thus impeached petitioner's testimony as to the events of January 6, 1966 directly, not collaterally. It was introduced by the District Attorney on the theory expressly argued in each of the courts below that the prosecution had an absolute right to utilize unconstitutionally obtained evidence for im-

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[2] "The only point upon which a distinction could have been drawn between a conviction on one charge and a disagreement on the other had to be the impeaching statement, for it and it alone distracted from the defendant's credibility. Consequently, the respondent will concede that if this appeal is found to turn solely on the question of whether or not the use of the statement constituted harmless error, the judgment will have to be reversed." (Respondent's Brief, New York Court of Appeals, page 8.)

[3] All of the portions of the illegal statement relevant to the count on which petitioner was convicted, were obtained subsequent to his fruitless request for counsel.

peachment purposes without limitation to collateral matters and without any claim that petitioner had waived his right against self-incrimination or opened the door in any way to such testimony. Petitioner had not mentioned his interrogation at any time during his direct testimony (A. 19-35).

After petitioner was found guilty on the second count he was sentenced to an indeterminate term of six to eight years in State's prison. Petitioner was confined at all times from his arrest on January 7, 1966, until July 22, 1970, at which time he was released on parole, which is his present status.

It is petitioner's contention that his conviction should be reversed because it was obtained by prejudicial use of an illegally obtained statement inadmissible for any purpose.

ARGUMENT

IMPEACHMENT USE OF PETITIONER'S UNCONSTITUTIONALLY OBTAINED STATEMENT VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION.

Point I

The Basic Illegality of the Statement Itself

The statement in question (A. 72-78) was taken from petitioner after his arrest (A. 73) in the presence of three Assistant District Attorneys, two other law enforcement officers, and the District Attorney's stenographer at the Office of the District Attorney in the County Courthouse (A. 72). It was taken at a "critical stage" of the prosecution and at a time when petitioner was entitled to counsel, *Escobedo v. Illinois*, 378 U.S. 478, and to be advised of his constitutional rights under this Court's decision in *Miranda v. Arizona*, 384 U.S. 436. The statement was taken without adequate *Miranda* warnings in the opinion of the trial judge (A. 66) who was the judicial officer charged with determining this before the statement could be admitted.

Miranda v. Arizona, 384 U.S. at 477; *Jackson v. Denno*, 378 U.S. 368.

In addition, the statement itself showed prior questioning (A. 74) in the absence of the stenographer. The District Attorney who tried the case and also took the statement conceded, in response to the court's question, that there had been no other or additional warnings than those held ineffective in the statement itself (A. 66). The trial took place after the effective date of the decision in *Miranda* (A. 5 et seq). Prior to any questioning as to the count on which he was convicted, defendant requested counsel before continuing (A. 74). After further brief discussion about the charges against him, the interrogating Assistant District Attorney warned him to worry about himself (A. 74), and then, in clear violation of *Escobedo* and of *Miranda*, 384 U.S. at 473-74, the questioning continued to its inevitable conclusion.

The very same Assistant who took the statement and prosecuted petitioner at the trial also made the determination, after a "measured evaluation", that "any use which might have been attempted to be made of it on the prosecution's direct case would have been improper". (Respondent's brief in the New York Court of Appeals, Pages 3 and 4.) This evaluation was endorsed by respondent in its briefs in both the Appellate Division and the Court of Appeals and accepted by both courts (A. 108, A. 113). It was concurred in by the trial judge (A. 66), and conceded also in this Court "the District Attorney's Office, because the defect is a glaring one, came to precisely the same conclusion, that it was involuntary and inadmissible" (brief in opposition to petition for certiorari, page 10).

Point II

Illegal Evidence is Inadmissible for any Purpose

By its decision herein, the New York Court of Appeals has enshrined in New York jurisprudence a fundamental failure to distinguish between merely *irrelevant* evidence and evidence which is *illegal* and thus, inadmissible for any purpose. Under familiar rules of evidence, a defendant who takes the stand in his own behalf places his credibility in issue thereby *making relevant* his otherwise irrelevant *legally obtained* prior convictions and allowing his impeachment thereby. However, by exercising his constitutional right to testify in his own behalf, a defendant does not miraculously render benign, or unoffensive to the constitution, the manner in which his statement was illegally obtained.[4] Indeed, the exact opposite is aptly demonstrated by this Court's decision in *Burgett v. Texas*, 389 U.S. 109, where *illegally* obtained convictions (in derogation of the right to counsel), sought to be used to impeach, were properly held inadmissible either "to support guilt or enhance punishment" 389 U.S. at 115.

The impeachment procedure employed in the instant case not only violated but completely emasculated the protection afforded petitioner by the Constitution and by the *Escobedo* and *Miranda* decisions. Defendant got neither the benefit of his right to counsel nor the full and complete warnings to which he was constitutionally entitled. Rather than vindictate these rights, the state courts have elevated this deprivation into a rule that encourages police officers and prosecutors (as in the instant case) and even judges (*People*

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[4]It is thus possible to "open the door" to evidence otherwise inadmissible because irrelevant, but it is not possible in this way to render constitutionally obtained that which has been illegally extracted. It simply cannot logically be said that such evidence is, or can be, made admissible by opening the door. This is so because no amount of testimony by a defendant, truthful or untruthful, and even as to extraneous matters, cures an illegal or unconstitutional extraction of evidence in violation of the right to counsel or the privilege against self-incrimination.

v. Boodie, 26 N.Y. 2d 779) to flagrantly violate the constitutional prohibitions in the hope that the fruits of such violations will be rewarded, either by impeachment use or by deterring a defendant from exercising his constitutional right to testify in his own defense. Federal officers have been forbidden such subterfuge by this Court's refusal to sanction such conduct (*Massiah v. United States*, 377 U.S. 201), *even where the incursion has resulted in a conviction*, in derogation of the right to counsel. (*Burgett v. Texas*, 389 U.S. 109.)

Whether the proper constitutional standard here applicable protects the rights "implicit in the concept of ordered liberty" or the rights "incorporated" through the fourteenth amendment, it is abundantly clear that petitioner's right to counsel, his privilege against self-incrimination and his due process rights are applicable to the states at this time. *Gideon v. Wainwright*, 372 U.S. 335; *Pointer v. Texas*, 380 U.S. 400; *Simmons v. United States*, 390 U.S. 377; *Malloy v. Hogan*, 378 U.S. 1. These rights can only be vindicated by the absolute prohibition of the use against petitioner of evidence concededly obtained by their violation. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all". (*Silverthorne Lumber Co. v United States*, 251 U.S. 385, at 392). "Circumvention of constitutional liberties is not to be encouraged by permitting the entry of illegally obtained evidence through the back door". (*People v. Burkett*, 235 A.2d 161, at 167 (Pa., Hoffman, J. concurring). "A contrary rule would unconstitutionally chill exercise of either the constitutional right to have evidence suppressed or the constitutional right to take the stand". (*People v. Marsh*, 165 N.W. 2d 853, 861, 14 Mich. App. 518 (1968)).

The conclusion that illegally obtained evidence is inadmissible for any purpose is consistent with the majority rule prevailing in this country, Annot: *Impeachment of*

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accused as witness by use of in *of involuntary or not properly qualified confession*, 89 ALR 2d 478, 479-80 (1963), with the prior determinations of this of this court, *Angello v. United States*, 269 U.S. 20; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; *Mapp v. Ohio*, 367 U.S. 643; and with its recent decisions as well. *Miranda v. Arizona*, 384 U.S. at 477, *Burgett v. Texas*, 389 U.S. 109; *Simmons v. United States*, 390 U.S. 377.

This rule effectuates the requirement that the police must obey the law while enforcing the law. Else, in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. *Spano v. New York*, 360 U.S. 315, 320-21; *Jackson v. Denno*, 378 U.S. 368, 386.

Point III

Neither Reason Nor Precedent Support Impeachment Use of Illegally Obtained Evidence

The respondent herein relies upon impeachment use as an apparent exception to the general rule forbidding the use of illegally obtained evidence. However, the ruling in the Court below, based upon *Walder v. United States*, 347 U.S. 62, and *People v. Kulis*, 18 N.Y. 2d 315, does not stand upon any authority firmly implanted in our law, nor does it accord with the logical distinction between illegal and irrelevant evidence referred to in Point II, supra.

To begin with, the majority rule in this country since at least 1894 (*Shephard v. State*, 88 Wis. 185, 59 N.W. 449) has been that an involuntary or otherwise unqualified confession may not be used to impry or otherwise unqualified contakes the stand in his own behalf impeach an accused person who *of accused as a witness by use* behalf. Annotation: *Impeachment qualified confession*, 89 ALR 2*use of involuntary or improperly* addition, this Court in *Agnello v.* LR 2d 478, 479-80 (1963). In reached a consonant result. See *llo v. United States*, 269 U.S. 20, *Co. v. United States*, 251 U.S. 3See also, *Silverthorne Lumber* .S. 385.

Walder v. United States, 347 U.S. 62, relied on by the New York Court of Appeals as authority for *Kulis* was this Court's only departure from the general rule, in that it sanctioned impeachment use of defendant's statement made in support of a motion to suppress in a prior criminal proceeding, apparently on the theory that the defendant by his protestations of innocence unrelated to the charge on trial had opened the door to such impeachment as to collateral matters. The underlying rationale of *Walder* was, of course, that the evidence necessarily furnished by the accused himself on his successful motion to suppress illegal evidence was admissible against him on a subsequent occasion.[5] Constitutional developments since that time have eliminated this necessary foundation of *Walder*.

In *Simmons v. United States*, 390 U.S. 377, returning to a rationale consistent with *Agnello*, *Silverthorne* and other similar decisions, it was expressly held by this Court that testimony obtained from an accused in the course of his vindication of a constitutional right could not subsequently be used against him without violating his privilege against self-incrimination. Thus, effectively undercutting the rationale upon which *Walder* was dependent. Accord, *People v. Luna*, 226 N.E. 2d 586, 590, 37 Ill. 2d 299 (1967).

In *Miranda v. Arizona*, 384 U.S. 436, this Court consistent therewith, determined that statements obtained in violation of that decision, although "merely intended to be exculpatory by the defendant are often used to impeach his testimony . . . and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." Id. at 477. Six Federal Circuit Courts are unanimous in the opinion that the last quoted decision effectively vitiates the application of *Walder* to the fact pattern presented by this

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[5] *Walder* also failed to distinguish between irrelevant and inadmissible evidence.

case. *Proctor v. United States*, 404 F.2d 819 (D.C. Cir. 1968); *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968); *United States ex rel. Hill v. Pinto*, 394 F.2d 470 (3d Cir. 1968); *Breedlove v. Beto*, 404 F.2d 1019 (5th Cir. 1968); *Groshart v. United States*, 392 F.2d 172 (9th Cir. 1968); *Wheeler v. United States*, 382 F.2d 998 (10th Cir. 1967). See also, *Gilday v. Scafati*, No. 7521 (1st Cir., June 25, 1970), (by implication).

A majority of the highest courts of our states strongly favor this conclusion. *State v. Brewton*, 247 Ore. 241, cert. den 387 U.S. 943 (1967); *Commonwealth v. Padgett*, 428 Pa. 229 (1968); *Gaertner v. State*, 35 Wis. 2d 159 (1968); *People v. Barry*, 237 Cal. App. 2d 154 (1965), cert. den., 386 U.S. 1024 (1967); *Commonwealth v. Robinson*, 239 A.2d 308, 428 Pa. 458 (1968); *Franklin v. State*, 252 A.2d 487 6 Md. App. 572 (1969); *People v. Luna*, 226 N.E. 2d 586, 37 Ill. 2d 299 (1967); *People v. Marsh*, 165 N.W. 2d 853 14 Mich. App. 518 (1968); *People v. Wilson*, 174 N.W. 2d 79 20 Mich. App. 410 (1969); *Cardwell v. Commonwealth*, 164 S.E. 2d 699 (Va. 1968); *State v. Galasso*, 217 So. 2d 326 (Fla. 1968); See also *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533, 89 ALR 2d 461; *Contra, People v. Harris*, 25 N.Y. 2d 175; *People v. Kulis*, 18 N.Y. 2d 315; *State v. Kimbrough*, 262 A.2d 232, 109 N.J. Super 57 (1970); *State v. Butler*, 19 Ohio St. 55, 249 N.E. 2d 818 (1969). The courts which favor the rule contended for by petitioner also include a number of Federal District Court opinions, among them *United States v. Prebish*, 290 F. Supp. 268, 276-75 (D.C. Fla. 1968); *United States v. Birrell*, 276 F. Supp. 798, 817 (S.D.N.Y. 1967).

If, as we urge, *Walder* is no longer good law "then, of course, the rationale of *People v. Kulis*, 18 N.Y. 2d 318, depending, as it does, on *Walder* will no longer be valid, and this case now before the Court is indefensible . . ." Brief in opposition to petition for certiorari, page 2.

It is respectfully noted that *Kulis* was a pre-*Miranda* case in which the *per curiam* opinion declined to apply *Miranda*

retroactively, over a strong dissent suggesting a contrary result in view of *Miranda*. In its *per curiam* opinion herein the New York Court of Appeals gave no explanation whatever of its reasoning with regard to the effect of *Miranda* on the validity of *Walder* or *Kulis*. Extensive reasoning on this point has, however, been the product of consideration of the question by the Federal Courts of Appeal.

The Second Circuit now holds that, ". . . it is absolutely plain that the Court intended to lay down a firm general rule with respect to the use of statements unconstitutionally obtained from a defendant in violation of *Miranda* standards. The rule prohibits the use of such statements, whether inculpatory or exculpatory, whether bearing on guilt or on collateral matters, only, and whether used on direct examination or for impeachment." *United States v. Fox*, 403 F.2d 97, 102 (1968).

The Third Circuit agrees that, ". . . coerced statements obtained from a defendant or statements taken in violation of *Escobedo* may not be used to impeach his credibility . . ." *U.S. ex rel. Hill v. Pinto*, 394 F.2d 470 (1968).

The Ninth Circuit squarely holds that, ". . . if statements are obtained from a defendant in violation of the *Miranda* rules and if the interrogation relates to an offense for which the defendant is ultimately brought to trial, these statements, as well as any portions thereof, may not be used against the defendant at the trial for any purpose whatsoever . . ." and "Insofar as *Walder* would compel a different result, it has, we believe, been undermined by the Supreme Court's *Miranda* decision". *Groshart v. United States*, 392 F.2d 172, 178 (1968).

The District of Columbia Circuit holds that *Walder* "does not apply to evidence obtained in violation of *Miranda*", *Proctor v. United States*, 404 F.2d 819 (1968, reh. den. 1969).

The Federal District Court in Florida points out that there are ". . . very strong reasons for questioning the result reached in *Walder*" and notes "growing realization that *Wal-*

der was a bad decision. In short the reasons against *Walder* have finally come to outweigh the reasons in favor of it." *United States v. Prebish,* 290 F. Supp. 268, 274-75 (1968).

The Federal Court for the Southern District of New York, in an early but prophetic opinion, notes that recent decisions (including the dissent in *Kulis* itself) have cast doubt on the validity of *Walder* and holds that, "because the precedental authority of *Walder* has been so seriously attenuated and because the trend of current constitutional development points in another direction, this court respectfully declines to follow *Walder*. The government should be restricted to using untainted evidence in the impeachment of witnesses, just as it is similarly restricted in making out its direct case." *United States v. Birrell,* 276 F. Supp. 798, 817 (1967).

Cases such as *United States v. Curry,* 358 F.2d 904, are simply "no longer governing law" in their own circuits. *United States v. Fox,* 403 F.2d 92, 102-03 (2 Cir. 1968). *Walder* itself "in the light of *Miranda* . . . is no longer controlling" (Id. at 103). *Waider* "does not apply to evidence obtained in violation of *Miranda*". Proctor v. United States, 404 F.2d 819, 821 (D.C. Cir. 1968, reh. den. 1969). This result is amply supported not merely by the cited precedents but by reason as well.

By comparison, the ruling of the New York Court of Appeals in this case disproportionately places a higher priority upon frustrating an alleged liar then upon vindicating fundamental constitutional rights. Its consequences are:

> (a) to provide encouragement and incentive to law enforcement officers to devise ever increasingly subtle methods for encroaching upon fifth, sixth, and fourteenth amendment rights by rewarding them with impeachment use of unconstitutionally obtained evidence or by effective frustration of a defendant's constitutional right to testify;
>
> (b) it fails to provide any vindication whatever for the constitutional rights which, as in petitioner's case, have been *concededly* violated;

(c) it forces an impermissible choice between the constitutional right to testify and the privilege against self-incrimination; the *Harris* holding directly conflicts with several decisions of this Court which forbid compelling the waiver of a constitutional right as a condition of exercising another legal right. Thus, in *Green v. United States*, 355 U.S. 184, this Court condemned the attempted compulsion of a waiver of the privilege against double jeopardy as the price of a successful appeal. In *United States v. Jackson*, 390 U.S. 470, this Court condemned the compulsion of the waiver of the right to trial by jury in order to avoid the dealth penalty. In *In re Winship*, 397 U.S. 358, this Court condemned an incursion on the due process right to proof beyond a reasonable doubt as the price of youthful offender treatment. In *Simmons v. United States*, 390 U.S. 377, this Court condemned an attempted compulsion of the waiver of the privilege against self-incrimination as the price for exercising a valid fourth amendment right to suppress evidence illegally seized. In the instant case, the New York Court of Appeals has compelled petitioner to waive his privilege against self-incrimination in order to exercise his right to testify in his own behalf. This "Hobson's Choice" is constitutionally impermissible under the decisions cited above. See also *People v. Luna*, 226 N.E. 2d 586, 37 Ill. 2d 299 (1967) and *People v. Marsh*, 165 N.W. 2d 853, 861, 14 Mich. App. 518 (1968).

(d) it avoids any pre-trial determination of voluntariness under *Jackson v. Denno* by the prosecutor's merely determining to use such illegally obtained evidence solely to impeach, and allows the prosecution to surprise the defendant who takes the stand (or at least his counsel) or to intimidate or deter a defendant from taking the stand. It eliminates a critical stage of the prosecution (*Jackson v. Denno* hearing) at the whim of the prosecutor who, depending on the amount of other evidence available to

him, can now attempt to use questionably constitutionally obtained evidence in this manner to achieve the element of surprise while at the same time avoiding a possible adverse determination.

(e) It raises a serious problem in light of *Bruton v. United States*, 391 U.S. 123, in that it is difficult to conceive, as in the instant case, of the jury limiting this type of evidence solely to the issue of defendant's credibility even under proper instructions. Both this Court in *Miranda*, 384 U.S. at 477, and the First Circuit in *Gilday v. Scafati*, No. 7521 (1st. Cir., June 24, 1970) have recognized that the purpose and implication of such evidence is to prove guilt itself. Moreover, in the instant case, a very learned and experienced trial judge who correctly charged the rule applicable to such evidence (A. 95 Fol. 575), nevertheless, also demonstrated his basic confusion with the rule confining such impeachment evidence to credibility. Thus, with regard to the first count of the indictment, Detective Bermudez testified that the defendant voluntarily made a sale to the detective (R. 92-100). The defendant testified on direct and on cross that there was no sale *at all* by defendant on the 4th of January (A. 24, 25, 40). The only evidence that petitioner acted as the detective's agent came from the statement itself (A. 75, 76) utilized on cross-examination solely to impeach credibility (A. 58, 59). The Court, nevertheless, charged that the jury could make a substantive (guilt or innocence) finding of agency (A. 96 Fol. 577), despite the fact that the only evidence of this was admitted solely to impeach defendant's credibility and not to prove guilt or innocence (A. 95). If the learned Court had such difficulty, then "to expect that the jury could wipe this from its memory and decide the petitioner's guilt only on the basis of the evidence [admitted for that purpose] is to place too much faith in a jury's ability to detach itself from reality." *Burgett v. Texas*, 389 U.S. 109, at 119 Chief Justice Warren, concurring).

(f) The rule applies harshly and unequally to indigent, illiterate, inexperienced, and youthful defendants who have no knowledge of their rights and who therefore need these rights the most, while at the same time having no effect upon professional criminals and recidivists. This point is no mere conjecture. It was urged by the National District Attorneys Association in *Miranda* itself. *Miranda v. Arizona*, 384 U.S. at 470.

(g) It implicates state courts and constitutes state action in direct violation rather than vindication of the constitutional rights involved.

(h) It degenerates into haphazard and unequal application of the rules relating to harmless error, collateral versus direct impeachment, opening the door and, finally, as in the New York Court of Appeals in this very case, subjective value judgments as to whether the statement was more or less incriminating than the petitioner's testimony.

(i) Inherent in the rationale behind the Harris rule is the suggestion that the defendant lied, either at the time of his statement or at the trial. (Brief in opposition to petition for certiorari, page 6.) This is a completely impermissible consideration in determining constitutionality of such a statement. *Rogers v. Richmond*, 365 U.S. 534, 543-44. See Frankfurter, J., dissenting, in *Stein v. New York*, 346 U.S. 156, at 200, quoted with approval in *Jackson v. Denno*, 378 U.S. 368, at 384. "This issue, must be decided without regard to the confirmation of details in the confession by reliable other evidence. The determination must not be influenced by an irrelevant feeling of certitude that the accused is guilty of the crime to which he confessed." See also *Jackson v. Denno*, 378 U.S. at 376-77.

(j) The application of *Kulis* to petitioner also reflects the evil condemned by this Court in *Burgett v. Texas*, 389 U.S. 109 at 119, in which this Court forbid the impeachment use of a counselless conviction either

to prove guilt or to enhance punishment. Since many, if not most, such counselless convictions are obtained upon a plea of guilty, is the ruling in *Burgett* not analogous with post arrest statements made in the absence of counsel? In each case the unconstitutionally obtained matter sought to be used to impeach would directly compound the violation of the right to counsel and the privilege against self-incrimination. In each case, it would deny due process of law.

(k) Under the theory and procedure utilized in this case the jury was never given any instruction of any kind relating to voluntariness. (A. 79-102, see especially A. 95). No determination of voluntariness was made by this jury. Compare, *Jackson v. Denno*, 378 U.S. at 387-88.

For all of the reasons hereinabove set forth, it is respectfully urged that the attempted impeachment exception to the general rule forbidding the use of illegally obtained evidence is unsupported by reason or precedent, is repugnant to the Constitution and the teachings of this Court, and should be rejected in this case.

Point IV

Prejudicial Use Was Made of Petitioner's Statement

Petitioner's statement was used virtually *in toto*. Although not physically exhibited to the jury, the prosecutor by the device of reading questions and answers at length and asking defendant if he made such statements in response to such questions, covered eight pages of the printed record with "excerpts" from defendant's statement. The entire statement consumes only six and one-half pages of the printed record (compare A. 58-65 with A. 72-78). The questions were asked in groups of three and four at a time (see A. 58, A. 59-60, A. 61, A. 62). They conveyed the entire substance of the document from which the prosecutioner was visibly

reading (as he himself observed A. 57). With specific regard to the second count of the indictment, Petitioner was asked (A. 61 through A. 63) all of the questions and answers relating to his sale of two "nickel bags" and his receipt of $12.00 and a "taste" or half bag of heroin occurring the night before the statement was taken from him. All of the portions relating to the second count of the indictment (on which petitioner was convicted) were subsequent in time to his request for counsel which had not been honored (A. 74, A. 75-78).

We think it unquestionable that the portions of the statement utilized in relation to the second count were direct evidence of the crime charged in that count rather than collateral thereto (see, for example, A. 62). They were significantly incriminating on the second count in light of petitioner's direct testimony. Petitioner had testified on direct that he and a friend had given Detective Bermudez baking soda in two discarded glassine envelopes in order to do him out of $12.00 (A. 30). However, the content of petitioner's statement as disclosed (A. 62) indicated that in addition to the $12.00, petitioner had received a "taste" or half bag of heroin which would have been absolutely valueless to the admitted addict petitioner (A. 23) if in fact the glassine envelopes contained only baking soda. This was a fact to which Detective Bermudez had never testified (R. 121; A. 88). It was significantly incriminating and used to prove guilt by implication in any meaningful sense in which those words may be used. *Miranda v. Arizona*, 384 U.S. 436, at 477; *People v. Kulis*, 18 N.Y. 2d 318, at 324 (Keating, J. dissenting); see also *Gilday v. Scafati*, No. 7527 (U.S. First Circuit Court of Appeals, June 24, 1970.) Its use was clearly prejudicial error.

Point V

The Impermissible Use of the Illegal Statement Cannot Be Harmless Error

In the Appellate Division, two Justices found no error and two Justices found reversible error in the impeachment use of defendant's illegally obtained statement. The fifth Judge, Mr. Justice Brennan, held that ". . . it is apparent that the statement pertaining to the events of January 6, 1966, when read before the jury, violated the holding in Kulis-Walder." However, he then held that the constitutional error was "harmless". Both Judge Brennan and the dissenting Justices agreed that the test of harmless error is the standard set forth in *Chapman v. California*, 386 U.S. 18, 24, that a constitutional error is reversible unless "harmless beyond a reasonable doubt". On this point we adopt verbatim the language of Judge Christ, dissenting in the Appellate Division, upon which we cannot improve.

> "An error is not harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (Fahy v. Connecticut, 375 U.S. 85, 86-87). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (Chapman v. California, supra). Surely, it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the January 4, charge (cf. Anderson v. Nelson, 390 U.S. 523, 525). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's." (A. 111, 31 A.D.2d at 831).

In the Appellate Division the respondent had not even suggested the application of harmless error to the fact pattern in this case.

We respectfully suggested in the Court of Appeals that Judge Brennan had utilized the doctrine of harmless error in clear and proper deference to the authority of the Court of Appeals since it was he who granted leave to appeal to that Court. This view was concured in by the respondent, as follows:

"POINT II

If the use of this statement violates the Kulis-Walder Rule, the judgment of conviction should be reversed.

We cannot in good conscience urge upon this Court the position that the use of the statement, if it violated the Kulis-Walder doctrine, was harmless error, and, along with the appellant, we believe and submit to the Court that Mr. Justice Brennan held it to be so simply to bring about an authoritative determination of Kulis-Walder in this Court. The commission of two crimes was unambiguously testified to on the trial by the undercover police officer to whom the sales of narcotics had been made. In each case, the defendant equally unambiguously denied it, although as to the latter sale he said the material he sold was baking soda. The testimony of each was for any effective purpose uncorroborated, and the only point upon which a distinction could have been drawn between a conviction on one charge and a disagreement on the other had to be the impeaching statement, for it and it alone detracted from the defendant's credibility. Consequently, the respondent will concede that if this appeal is found to turn solely on the question of whether or not the use of the statement constituted harmless error, the judgment will have to be reversed." (Respondent's Brief, New York Court of Appeals, page 8).

The New York Court of Appeals opinion contained no reference whatever to harmless error.

It is respectfully urged that on the facts here shown (i.e., the same proof less the improperly utilized statement was insufficient for conviction on the first count) the error cannot be considered harmless. This is not a case where the statement admitted was confined to incidental or collateral matters, nor was the proof of guilt overwhelming. In this case, it is impossible to say with any degree of certainty whatever that the difference in the jury's findings on the two identical counts did not result solely and directly from the single significant variation in the proof-the illegally obtained and improperly utilized statement of the defendant. Such use was prejudicial and reversible error. *Chapman v. California*, supra. Upon less compelling fact patterns, the Federal courts have recognized similar errors as reversible even in the absence of objection. *Proctor v. United States*, 404 F.2d 819, 822 (D.C. Cir. 1968, reh. den., 1969); *Breedlove v. Beto*, 404 F.2d 1019, 1021 (5 Cir. 1968). See also, *United States v. Poe*, 352 F.2d 639 (D.C. Cir. 1965).

Point VI

The New York Court of Appeals Interpreted and Applied Sec. 813-f of the New York Code of Criminal Procedure Unconstitutionally

The respondent contends that petitioner's statement was properly used for impeachment without compliance with Section 813(f) of the Code of Criminal Procedure because "even a judicial ruling that the statement was inadmissible would not be a bar to its use for purposes of impeachment. *People v. Kulis*, 18 N.Y. 2d 318" (respondent's brief in Appellate Division, p. 3).

It is petitioner's contention that the respondent was required to serve the notice pursuant to Section 813(f) and that a judicial ruling of inadmissibility pursuant to Section 813(g) would bar the use of the statement for any purpose. This view was rejected in the Courts below which held that Section 813(f) does not apply to a statement used solely for

impeachment.[6] The statute, however, expressly applies to the offering of any admission (oral or written) into evidence. (consonant with *Jackson v. Denno*, 378 U.S. 368, which was the basic exposition of the constitutional right which requires such legislation. We urge that the statute cannot be interpreted or applied more narrowly than the constitutional right which compelled its enactment). The New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have this issue fairly and reliably determined. *Jackson v. Denno*, 378 U.S. at 389). The federal rule is squarly contrary to the State Court holding in this case. *Breedlove v. Beto*, 404 F.2d 1019 (5 Cir. 1968).

In *Breedlove*, the court noted that the illegal statement was not offered into evidence, was not read to the jury, was not claimed to be involuntary, and that there was no sufficient objection by defense counsel to its impeachment use (404 F.2d at 1021). Nevertheless, the court held squarely that "the statement was injected into evidence by the Dis-

---

[6]See, however, N.Y. Criminal Procedure Law, Chapter 996, Laws of 1970 (Effective Sept. 1, 1971) § 60.45 RULES OF EVIDENCE; admissibility of statements of defendants.

1. Evidence of a written or oral confession, admission, or other statement made by a defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.

2. A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him:

(a) . . . .

(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:

(i) . . . .

(ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

25

trict Attorney's use of it during
1022) and that therefore, "the s
ing to pass on the voluntarine
allowing the jury to hear it" (Id.
378 U.S. 368, is dispositive of t
(Id. at 1020) in reversing for pla
proper objection.

It was error for the District A
Section 813(f) notice and therea
ment and its admission in cros
Court should not have permitte
of the contents of defendant's
"that the statement had been
Miranda warnings" (A. 66) and
fendant had requested, but not
counsel. Judge Dempsey expre
tion of the danger of this proce
the prophetic warning of Judge
itself (A. 68).

The respondent conceded tha
tion 813(f) notice "puts the ap
have been following the 813(f
that had been decided most fav
ent's brief in the Appellate Divi
this latter statement is an accur
of the prosecution's failure to s
urge that as a result, the statem
purpose. *United States v. Carig*

In summary, we contend tha
to fail to serve the statutory no
vents the people from making
fendant's statement. We respec
establish the firm rule that a *Ja*
(f) type hearing is requisite to
by the prosecution for any pur
hold such hearing precludes its
any purpose.

ring cross-examination" (Id. at
he state trial judge erred in fail-
riness of the statement before
(Id. at 1022). *Jackson v. Denno*,
of the question said the court
plain error despite the lack of

ct Attorney to fail to serve the
reafter utilize defendant's state-
cross-examination. The Trial
itted the jury to hear any part
t's statement after it determined
en elicited without the full
nd that it was made after de-
not obtained, the assistance of
pressly cautioned the prosecu-
ocedure in view of *Miranda* and
dge Keating's dissent in *Kulis*

that the failure to serve a Sec-
appellant right where he would
13(f) and 813(g) procedures if
favorably to him". (Respond-
Division, p. 2). We agree that
curate description of the effect
to serve the required notice and
tement was inadmissible for any
gnan, 342 U.S. 36, 38.

that it was constitutional error
notice and that this failure pre-
ing any use whatever of de-
pectfully urge that this court
Jackson v. Denno-Section 813
to any admission made use of
purpose and that the failure to
its use in any manner and for

CONCLUSION

For the reasons set forth herein the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

JOEL MARTIN AURNOU
One North Broadway
White Plains, New York
10601

Attorney for Petitioner,
Viven Harris

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

CARL A. VERGARI,
District Attorney of Westchester County,
Court House,
White Plains,
New York 10601.
914 761—1144

By: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
Of Counsel.

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

Statement

This is a writ of certiorari granted by the Court by its order of June 1, 1970, which is directed to the New York Court of Appeals to review its judgment and order made and entered on July 2, 1969, which affirmed an order of the New York Supreme Court, Appellate Division, Second Judicial Department, made and entered on February 17, 1969, which affirmed by a divided court a judgment of conviction imposed upon the petitioner on December 20, 1966, in the County Court of Westchester County, Honorable

Robert E. Dempsey, J., and a jury whereby he was convicted of the crime of Feloniously Selling A Narcotic Drug. The jury was unable to agree as to a second count in the indictment by which he was charged with the commission of the same crime on a different date. Upon such conviction he was sentenced to a term of imprisonment of from six to eight years. On July 22, 1970, he was released on parole.

Facts

By arrangement with Commissioner Edward Carey of the New Rochelle, New York, Police Department, himself the retired head of the New York City Police Department Narcotics Bureau, two New York City narcotics detectives on December 6, 1965, began an investigation into the distribution of narcotics in New Rochelle (88-90 R[1]). The two detectives, George Bermudez, who adopted the cover name of Joe Vegas or Joe V., and Richard Parks, who was known as Eddie Que (90, 317 R), moved into an inexpensive rooming house upstairs from the Four Hundred Club at 400 North Avenue in New Rochelle (203, 234 R). From that point of vantage, they infiltrated this small group of dealers in and users of narcotics who inhabited that area. Among others with whom they became friendly was this petitioner, Viven Harris (91, 204-205 R).

On January 4, 1966, at about 5:30 P.M., the two detectives entered the Three Fours Bar and Grill at 444 North Avenue, New Rochelle (92 R). Approximately at 6:30 P.M. the petitioner walked in and joined the policemen and a couple of fellows they were talking to (92, 319 R). He asked one of the four, Charlie, if Charlie was interested in buying a guitar. Charlie declined, but Detective Bermudez

---

[1] Numbers followed by an R have reference to the original typed minutes of the proceedings before the County Court of Westchester County.

expressed some interest, so petitioner offered it to him for thirty-five dollars (92 R). Bermudez sent Parks with the petitioner to see if the guitar was worth that price, and the two left (92, 319 R). Parks went with Harris to the latter's house, examined the guitar and returned to the vicinity of the Three Fours (319 R) where the two detectives once again joined forces (93, 319 R). Parks reported that the guitar was worth twenty-five dollars and Bermudez asked the petitioner to wait a few minutes for him, that he'd like to see the guitar himself. The petitioner said he couldn't because he had to go downtown to "score half a load," which the detective translated as meaning to buy or otherwise secure fifteen decks of heroin (93-94 R).

The detectives returned to the Three Fours at about 7:10 P.M. and the petitioner got back about an hour later. Bermudez feigned anger at Harris for being so late, and Harris said, "I told you I had to go downtown to get a couple of half-loads" (95 R). They began to talk about the guitar and finally the two men, petitioner and Bermudez, left the bar and drove to the petitioner's house. En route, Bermudez said, "What's happening?" to which Harris replied, "What do you want?" Bermudez told him he'd take a half-load (95 R). This exchange, the detective testified, was narcotics jargon for, "Do you have any narcotics?" and "Yes, how much do you want?" The petitioner balked at selling that much because he had just started distributing narcotics again and he had a partner who would have to approve so large a sale. He offered Bermudez a single bag, however (96 R).

The two men then went up to the petitioner's apartment where Bermudez looked at the guitar and offered petitioner twenty-five dollars for it. For a while he held out for thirty-five, but he finally accepted the lesser sum, and Bermudez gave him thirty-dollars, a twenty and a ten. He pocketed the money and made no effort to give Bermudez any change (97 R). They went to a nearby poolroom to see Al, the petitioner's partner. Bermudez of-

fered thirty dollars for the half-load of fifteen decks, and Al insisted on thirty-five. They dickered for a few minutes, but neither would budge, so Al went back into the poolroom. On the way back to the car, the petitioner offered Bermudez a single bag for seven dollars, but when Bermudez flatly refused to pay more than five he accepted it, and they returned to the petitioner's house. He went upstairs while the detective waited in the car, and in a few minutes came back down and handed Bermudez a glassine envelope which contained a white powder. Bermudez didn't pay him for it because he had five dollars change coming to him from the guitar transaction (98-100 R). This powder was later identified by a police chemist as heroin (279-282 R).

The detectives next encountered the petitioner on January 6, 1966, at about 8:25 P.M., again at the Three Fours Bar (117-118, 323 R). The petitioner asked Bermudez if he had any heroin, and Bermudez told him that he didn't and in the course of the ensuing conversation the petitioner asked if he wanted any. Bermudez said he wanted two bags, but the petitioner warned him the price was up to seven dollars a bag. After a little bit of haggling they agreed on six dollars a bag, and with that the petitioner left the bar (118-119 R). The detective remained at the bar for twenty to thirty minutes, and when the petitioner came back he asked Bermudez to walk outside with him. Again the two men left the bar and in Bermudez' car he handed over the two bags of white powder, and the detective paid him the twelve dollars (120-121 R).

Apparently the petitioner was impressed with the way Bermudez handled himself, because he told him that he, the petitioner, was one of a four man partnership, all of whom he named, who were selling heroin in Yonkers and New Rochelle, in New York, and in Connecticut, and he offered Bermudez the New Jersey franchise, in a manner of speaking. Bermudez turned him down cold on the pre-

text that he was opening his own business the following week and could beat the petitioner's prices. The petitioner responded, "Maybe I can do something for you if you want to go into action for me. I'll let you have half-loads at twenty-two dollars a half" (121 R). The two bags of white powder for which the detective paid twelve dollars were also identified by a police chemist as heroin (285-288 R).

In his own defense, the petitioner called one Luther Harris who, about a month before, had pleaded guilty to attempted possession of a narcotic drug in satisfaction of an indictment by which he was charged with the felonious sale of heroin, which indictment arose out of the same Bermudez-Parks investigation. Upon more thoughtful reflection, though, and after consultation with his attorney, he decided not to testify (371-387 R). Incidentally, so far as appears, the petitioner and Luther Harris were not related.

Finally, the petitioner testified in his own behalf. He testified that he first saw Bermudez on the evening of January 4, 1966, in the Three Fours Bar (391 R). They met in a group, and, according to the petitioner, if narcotics was discussed, it was out of his presence (392 R). Some time thereafter, he testified, Bermudez asked him if he could get a bag of heroin for him, but the petitioner told him there was a panic, an acute shortage of drugs, and if they could be gotten the petitioner would be using them himself instead of the Robitussin A. C. cough medicine he was being forced to resort to (394-395 R). He said that about two weeks before that date he and a couple of other fellows had gotten a bag of heroin for Bermudez of which they took a small portion before giving it to him, but he denied having bought anything for him on January 4th (395-399 R).

Petitioner met Bermudez two nights later at the Three Fours and again, according to the petitioner, Bermudez

asked him for heroin. This time he wanted a half-load, and, again, petitioner told him there was a panic on, and drugs simply weren't available. Bermudez moderated his demand and asked if the petitioner could get him two bags, but again he was told there was nothing for sale (400-402 R). At that point Henry Stanley, a friend of the petitioner, injected himself into the conversation. Stanley gave the petitioner a dig in the ribs, called him aside, and suggested they take Bermudez' money and palm off some heroin substitute on him. Petitioner fell in with the plan, and they went to his house, and after fooling around unsuccessfully with powered infant's formula, they hit upon baking powder. This was acceptable since Bermudez had told them he was a "snorter," an addict who sniffed the narcotic into his nostrils, and baking powder had a comparable sting when used in that way. They prepared two glassine envelopes of baking powder and brought them back to Bermudez at the Three Fours. After warning Bermudez that what they had given him was a light dosage due to the panic, they took his twelve dollars and with four more they scraped up between them went to New York City to get heroin for their own use. The petitioner categorically denied that he ever sold Bermudez any drugs (402-410 R).

In the late afternoon or early evening of the following day, January 7, 1966, Bermudez and Parks arrested the petitioner in New Rochelle and brought him immediately to the office of the District Attorney of Westchester County where at 7:10 P. M. he was interrogated by an assistant district attorney. The statement he gave at that point and which the prosecution used to impeach his trial testimony constitutes the heart of this appeal (131-132 R, 72-78).

Argument

The Use to Which the Petitioner's Statement Was Put Was Perfectly Proper.

POINT I

The illegality of the statement.

The petitioner has argued under this Point the "basic illegality of the statement itself" (Petitioner's Brief, p. 7). In his view that basic illegality springs from two sources: the failure of the assistant district attorney to give him the four warnings required by *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, and his having been interrogated without the presence of counsel. We would prefer to answer these two arguments in inverse order.

The statement began at 7:10 P. M. (A-72) and ended at 7:19 P. M. (A-78), and it takes up ten printed folios. Thus, at folio 5, or midway through the statement, the petitioner, in response to a question, said:

> "Yes, but I'd rather see a lawyer before I keep on." (A-74)

If the interrogation had continued at that point with no acknowledgment by the questioner that the petitioner had a right to consult an attorney, the confession without doubt would be inadmissible by both New York and Federal standards, *People* v. *Noble,* 9 N. Y. 2d 571, 175 N. E. 2d 451; *Columbe* v. *Connecticut,* 367 U. S. 568, 6 L. ed. 2d 1037, 81 S. Ct. 1860. That did not occur, though. The entire character of the interview changed in an instant. Instead of its continuing as a probe for information, it became an exposition of the petitioner's right to have an attorney:

> "Q. That's your privilege. That is your right. You want to call one up now? A. No.

"Q. What? A. No, I'll call tomorrow.
"Q. You will call him tomorrow? A. Yes." (A-74)

This must surely constitute a waiver of the right to counsel, at that point at least, because the standard of *Carnley* v. *Cochran,* 369 U. S. 506, 516, 8 L. ed. 2d 70, 77, 82 S. Ct. 884, reaffirmed in *Miranda* v. *Arizona, supra,* 384 U. S. at 475, 16 L. ed. 2d at 724, was precisely met here. In *Carnley,* the Court said:

> "Presuming waiver from a silent waiver is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."

The Court will understand, of course, that we are not attempting to indicate that the *Miranda* requirements were adhered to; they were not. What we would ask the Court to note, though, is that the petitioner unmistakably knew of the fact that he had the option of remaining silent if he chose not to answer questions (A-72), he was firmly advised that if he chose to speak, what he said could be used against him (A-73), and in full awareness of his right to consult with an attorney he voluntarily and rationally waived that right (A-74). So much, we submit, for the petitioner's claim that he was questioned in the absence of an attorney.

Moving, then, to the bar to the statement's admissibility presented by *Miranda* v. *Arizona, supra,* we would point out initially that it was taken on January 7, 1966 (A-72), roughly five months before *Miranda* was decided. When it was taken, therefore, in terms of the then applicable law, it was fully admissible. It was only declared to be inadmissible on June 20, 1966, when this Court decided *Johnson* v. *New Jersey,* 384 U. S. 719, L. ed. 2d 882, 86 S. Ct. 1772, and it was deficient in only one respect, that the assistant

district attorney had not advised the petitioner that if he could not afford an attorney, one would be appointed for him. Throughout the entire progress of this case in the New York courts we acknowledged the inadmissibility of this statement because it would have been unrealistic to expect that the State courts would otherwise regard it, inasmuch as to have done so would have placed them in direct conflict with *Miranda* and *Johnson*. In this Court, however, we are no longer prepared to concede its inadmissibility because we finally find ourselves in a forum which can make definitive distinctions between those two cases and this one.

We would first ask the Court to consider the brief dialogue between the petitioner and the assistant district attorney at page 74 of the Appendix which we have quoted, *supra*. From that it is perfectly evident that money was no deterrent to his consulting an attorney because he fully intended to consult with one the following day. As we read *Miranda* v. *Arizona, supra,* the reason for the fourth warning, i.e., the appointment of an attorney for an indigent, appears to be to put him on a plane with the affluent. As the Court put it:

> "Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one." *Miranda* v. *Arizona, supra,* 384 U. S. at 473, 16 L. ed. 2d 723.

The unstated corollary, of course, is that an indigent, feeling that paying a lawyer would be out of the question, would "waive" the services of an attorney if he did not know he could have one free. Clearly, however, this was not the petitioner's situation. Whether it be thought that he had an attorney—and the use of the word "him," rather than "one" suggests that likelihood—or that he had the resources to retain a lawyer, it is plain that he felt no

financial restraint on his getting legal advice. Manifestly, no fourth warning was required as to him because he was operating under no such misapprehension as the Court was guarding against in mandating it in the usual case.

Simultaneously, we would ask the Court to re-evaluate *Johnson* v. *New Jersey, supra.* As the Court knows, that case made all confessions which did not conform to the *Miranda* requirements inadmissible at trials which began after June 13, 1966. In *Johnson,* the Court discussed the reasons why *Miranda* should have only prospective effect and pointed out:

> "Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed. We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See, Haynes v. Washington, supra; Spano v. New York, supra. Prior to Escobedo and Miranda, however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See Crooker v. California, 357 U. S. 433, 2 L. ed. 2d 1448, 78 S. Ct. 1287 (1958); Cicenia v. Lagay, 357 U. S. 504, 2 L. ed. 2d 1523, 78 S. Ct. 1297 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding Escobedo and Miranda." *Johnson* v. *New Jersey, supra,* 384 U. S. at 731, 16 L. ed. 2d at 891.

The Court concluded therefrom:

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the volun-

tariness test." *Johnson* v. *New Jersey, supra,* 384 U. S. at 732, 16 L. ed. 2d 892.

However, what the Court may have overlooked were the cases of *present* defendants, those from whom confessions were taken before *Miranda* was announced and who came to trial after *Miranda.* The Court, discussing the new *Miranda* rule, said:

> "Law enforcement officers and trial courts will have fair notice that statements *taken* in violation of these standards may not be used against an accused." *Johnson* v. *New Jersey, supra,* 384 U. S. 732, 16 L. ed. 2d 892; Emphasis added.

But as to those whom we have called present defendants, law enforcement officers did not have fair notice of the new standards, but they were nevertheless being held to them. They had fair notice that they should *take* no more such statements, but, regrettably, no provision was made by the Court for the use of statements taken by law enforcement officers in good faith prior to *Miranda* and in full conformity with the law on which the Court concluded they had fairly relied, in cases which had not yet come to trial.

Since *Johnson,* the Court has decided *Stovall* v. *Denno,* 388 U. S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967, and *Desist* v. *United States,* 394 U. S. 244, 22 L. ed. 2d 248, 89 S. Ct. 1030, and in each of these has established as the cut-off date the date the prohibited conduct was done. If *Johnson* had adopted the same standard, which the Court has since suggested may be a better one, *Jenkins* v. *Delaware,* 395 U. S. 213, 219 n. 7, 23 L. ed. 2d 253, 259, 89 S. Ct. 1677, 1680, then this present statement would have retained its initial validity, and there would be no need to inquire into the use to which it might properly have been put.

POINT II

No illegal evidence was admitted into evidence in this case.

The petitioner is arguing here that the statement he gave the police was inadmissible into evidence. With that statement, at least in the conformation of this appeal, we cannot disagree. What the Court must bear in mind, however, is that the statement was not truly admitted into evidence.[2] It may be that our confusion about the petitioner's argument here—and we do admit to a certain amount of confusion—arises from his attempt to couple and to make logical contradictories out of illegal and irrelevant evidence. It is submitted that this cannot be done, if only for the reason that a given piece of evidence might be both or it might be neither.

If *Burgett* v. *Texas*, 389 U. S. 109, L. ed. 2d 319, 88 S. Ct. 258, upon which the petitioner relies be examined, it will be found to add no weight at all to his argument. The first and most obvious distinction to be made between this case and *Burgett* is that in the latter the prosecution introduced the tainted matter as a part of its direct case. That factor alone puts this case beyond the scope of *Burgett's* precedential authority because here the prosecution scrupulously avoided any reference to the petitioner's confession on its direct case. The second point of distinction is that the prior conviction in *Burgett* was an indispensable element of the State's case, because in Texas, apparently, the trial of the substantive case is not bifurcated from the punishment aspect of the case. The confession in this prosecution was by no means a necessary part of the case.

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[2] It was in a highly technical sense admitted into evidence, but solely for the purpose of securing its identity in the record for the appellate courts. See Petitioner's Brief, fn. 1, p. 5.

Neither does *Massiah* v. *United States*, 377 U. S. 201, 12 L. ed. 2d 246, 84 S. Ct. 1199, assist the petitioner, because there too the illegal evidence was admitted as part of the Government's direct case. Here that just didn't happen.

The oft-used quotation from *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, 392, 64 L. ed. 319, 321, 40 S. Ct. 182:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

is singularly inappropriate in this context. It applies, of course, to what later became well known as the Fruit of the Poisonous Tree Doctrine. In other words, a law enforcement officer may not resort to illegal methods of securing evidence against a defendant which thereafter will be utilized to secure his conviction. The proscription, though, outlaws as well the use of the secondary evidence on the prosecutor's direct case, and that is the force of the quotation. As we have pointed out, that didn't happen here.

Thus it is with all of the petitioner's cases with the exception of *Commonwealth* v. *Burkett*, 211 Pa. Super. 299, 235 A. 2d 161; and *People* v. *Marsh*, 14 Mich. App. 518, 165 N. W. 2d 853. The latter are in point, and we will discuss them at Point III, *infra*, but all of his Federal cases deal with evidence introduced on the prosecution's direct case and hence are inapposite here.

POINT III

The petitioner's confession was properly used to impeach his direct testimony.

The Court is here called upon to decide whether *Walder* v. *United States*, 347 U. S. 62, 98 L. ed. 503, 74 S. Ct. 354, is or is not good law and whether or not it is worthy of perpetuation. In support of his assertion that it is not, the petitioner has cited no fewer than sixteen jurisdictions in which various courts throughout the country have come to the conclusion that it is not. Theirs is, however, not the only evaluation of the question which can be made, because eight States have arrived at a precisely opposite assessment:

People v. *La Batt*, 246 N. E. 2d 845, 108 Ill. A. 2d 18;
State v. *Jackson*, 443 P. 2d 279, 201 Kan. 795, cert. denied 394 U. S. 908;
May v. *State*, 211 So. 2d 845 (Mississippi, 1968);
Serrano v. *State*, 447 P. 2d 497, 84 Nev. 678;
State v. *Kimbrough*, 262 A. 2d 232, 109 N. J. Super. 57;
People v. *Boodie*, 257 A. 2d 657, 26 N. Y. 2d 779;
State v. *Butler*, 249 N. E. 2d 818, 19 Ohio St. 2d 55;
State v. *McClung*, 404 P. 2d 460, 66 Wash. 2d 654;
State v. *Hayes*, 439 P. 2d 978, 73 Wash. 2d 568;
State v. *Smith*, 446 P. 2d 571, 74 Wash. 2d 744.

The question presented by this case, though, cannot be resolved in the coldly statistical way a sports contest, for example, is, with the winner being decided by the number of tallies he has made. Consequently, even if sixteen to eight will win a baseball game, it should not prevail here.

This problem, it is submitted, is best explored by going back to the old common law and tracing the evolution

through the years of the whole concept of the defendant as a witness. At common law, of course, he was absolutely precluded from testifying, *Wolfson* v. *United States,* 101 F. 430, 435 (5th Circuit, 1900), cert. denied 180 U. S. 637, 45 L. Ed. 710, 21 S. Ct. 919. In New York State in 1869, however, this impediment was removed, and for the first time an accused was permitted, if he so chose, to be a witness in his own case, Laws of New York of 1869, Ch. 678. In the following year of 1870, the New York Court of Appeals was called upon for the first time to interpret the new law, and it held:

> "The defendant, however, appeared before the court below in a double capacity, that of an accused party on trial, and that of a witness. As an accused party on trial, she was entitled to the application of the rule, that her character could not be attacked, unless she herself opened the question. She had the benefit of it, as the district attorney opened and closed his case without allusion to her character. She however chose to avail herself of the statute of 1869, which permitted her to make herself a 'competent witness' in the case. She was not compelled to take this position, the statute declaring that the failure to testify should not create any presumption against her. (Stat. *supra.*) She elected, however, to make herself a witness. She became and was a competent witness. For this purpose, she left her position as a defendant, and while upon the stand, was subject to the same rules, and called upon to submit to the same tests which could by law be applied to other witnesses. Her statements were made to the jury under the solemnity of an oath. In theory of law, this gave greater weight to her narration than if she had placed her simple declaration before the jury, unaccompanied by her oath. She cannot claim the advantages of the position of a witness, and at the same time avoid its duties and responsibilities." *Brandon* v. *People,* 42 N. Y. 265, 267-268.

Although not necessarily in response to either the New York statute or the *Brandon* decision, a number of other States arrived at identical assessments of the role of the accused as a witness:

> *Thomas* v. *State*, 2 N. E. 803, 103 Ind. 419 (1885);
> *State* v. *Lewis*, 43 Pac. 265, 56 Kan. 374 (1896);
> *Commonwealth* v. *Nichols*, 19 A. R. 346, 114 Mass. 285 (1873);
> *People* v. *Sutherland*, 62 N. W. 566, 104 Mich. 468 (1895);
> *State* v. *Clinton*, 29 A. R. 506, 67 Mo. 380 (1878);
> *Yanke* v. *State*, 8 N. W. 276, 51 Wis. 464 (1881).

In 1878 the Congress enacted a statute substantially similar to that of New York, 28 U.S.C.A. § 632, and the Federal courts joined the growing number of jurisdictions which abandoned the common law prohibition against the defendant's testifying. The keystone of all these cases was that if a defendant chose to testify he waived his right against self-incrimination and, as a witness, became completely indistinguishable from every other witness as to the scope within which he could be cross-examined. As this Court put it:

> "On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may, either, at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observations. The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As

to that he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness." *Reagan* v. *United States,* 157 U. S. 301, 305, 39 L. ed. 709, 710-711, 15 S. Ct. 610, 611 (1894).

In view of the very widely held impression that an accused was subject to impeachment to the same extent as was any other witness, there is nothing at all surprising in finding that statements by an accused which on the prosecutor's direct case would have been inadmissible were nonetheless perfectly proper vehicles for attacking his credibility as a witness, *Commonwealth* v. *Tolliver,* 119 Mass. 312; *State* v. *Hagen,* 65 S. W. 249, 254, 164 Mo. 654; *State* v. *Broadbent,* 71 P. 1, 27 Mont. 342; *State* v. *Butler,* 34 P. 2d 1100; *Harrold* v. *Territory,* 89 P. 202, 18 Okla. 395; *Thaniel* v. *Commonwealth,* 11 S. E. 259, 132 Va. 215. See also, Wigmore on Evidence, V. III, § 821, p. 242, n. 3.

The first significant departure from this entirely consistent rule—and it was not really a departure at all—came in 1909 with the reversal of *Harrold* v. *Territory, supra,* by the United States Circuit Court of Appeals for the Eighth Circuit, *Harrold* v. *Territory,* 169 F. 47. There the Court distinguished between a confession which was voluntary in the traditional sense and one which was not. The Court held:

> "First, a confession by the accused of his guilt or of facts tending to establish it, obtained by the compulsion or inspiration of hope, fear or any other sort of inducement, is incompetent against him because it is not worthy of belief." *Harrold* v. *Territory, supra,* 169 F. at 48,

and continued:

> "The reason for the first rule is that confessions induced by hope or fear inspired by promises, threats

> or surrounding circumstances are likely to be untrue, are unreliable, incredible, and, therefore, not evidence of the truth." *Harrold* v. *Territory, supra,* 169 F. at 49.

It was a reasonable distinction, and it was quickly adopted by a substantial number of jurisdictions. See, for example, *Crawford* v. *State,* 70 So. 374, 70 Fla. 335 (1915); *Cross* v. *State,* 221 S. W. 489, 142 Tenn. 510 (1920); *State* v. *Carson,* 126 S. E. 755, 131 So. C. 331 (1925); *State* v. *Hoffman,* 220 N. W. 615, 53 S. D. 182 (1928). It remained a tangible, workable point of distinction up until May, 1966, *Commonwealth* v. *Kleciak,* 216 N. E. 2d 417, 350 Mass. 679, although we do not suggest that it was a uniformly followed rule; see, for example, *State* v. *Turnbow,* 354 P. 2d 533, 67 N. M. 241.

However, in this context, *Walder* v. *United States, supra,* was almost predictable, because if, as a great many courts believed, a voluntary statement, even though inadmissible, was reliable, so were the *Walder* 1950 narcotics unimpeachable evidence of their possession, although they too were inadmissible. Consequently, the use of each as a source of impeachment of the defendant's direct testimony was perfectly permissible.

Immediately following the Massachusetts ruling in *Commonwealth* v. *Kleciak, supra,* this Court decided *Miranda* v. *Arizona, supra.* In that case, the Court said:

> "If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective

waiver required for any other statement." *Miranda* v. *Arizona, supra,* 384 U. S. at 477, 16 L. ed. 2d at 725.

This reference by the Court to impeachment by means of a statement persuaded some courts that this Court had abandoned its *Walder* position and was saying that impeachment could be accomplished only by a statement which conformed to the *Miranda* standards. See, for example, *Proctor* v. *United States,* 404 F. 2d 819; *Groshart* v. *United States,* 392 F. 2d 172; *United States ex rel. Hill* v. *Pinto,* 394 F. 2d 470; *United States* v. *Fox,* 403 F. 2d 97. This broad a reading of *Miranda* is not necessary, though, because that case deals not with voluntariness per se but with admissibility. This is demonstrated by the opening paragraph of the decision which characterizes the whole decision:

> "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, *we deal with the admissibility of statements* obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." *Miranda* v. *Arizona, supra,* 384 U. S. at 439, 16 L. ed. 2d at 704. (Emphasis added.)

Furthermore, the Court's statement referring to the *Miranda* ruling:

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test." *Johnson* v. *New Jersey, supra,* 384 U. S. at 732, 16 L. ed. 2d at 892.

surely permits the inference, by the Court's having distinguished between them, that the *Miranda* standard tests only admissibility and not voluntariness. It was this fundamental question which so closely divided the Oregon Supreme Court in *State* v. *Brewton*, 422 P. 2d 581, 247 Ore. 241, with three judges willing to allow the use for impeachment of an inadmissible statement simply on the premise that it was voluntarily given. If *Miranda* is deemed to refer solely to admissibility, then it is completely consistent with *Walder*. If, for example, a defendant gives two exculpatory statements to police officers which are wholly at variance each with the other, they would be relevant and competent evidence on the prosecution's direct case. However, to be admissible they would first have to pass the *Miranda* test, and if they did not they would not be admitted. That is the *Miranda* ruling. However, if the defendant thereafter chose to testify, there seems no purpose in prohibiting the prosecutor's questioning him by the use of the statements, because, like any witness, he was impeachable by the use of prior inconsistent statements so long as they were voluntary and thus, to paraphrase *Harrold:*

> true, reliable, credible and, therefore, evidence of the truth.

Admissibility would no longer be the key; they would not be being admitted, and whether or not they were voluntary would then be the only question.

What must be remembered here is that:

> "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry* v. *Ohio*, 392 U. S. 1, 12, 20 L. Ed. 2d 889, 900, 88 S. Ct. 1868, 1875.

Presumably the same rationale applies to violations of the Fifth Amendment rights, and, while it is not difficult

to envision a police officer calculatedly conducting an illegal search, it is virtually impossible to conceive of his going after an illegal confession which at the same time would retain its voluntary character. Differently stated, the average working police officer is not looking for material to impeach the credibility of his prisoner for possible use in the statistically small likelihood of that man's going to trial and testifying in his defense. Therefore, police misconduct is not going to be deterred by the abandonment of the *Walder* doctrine, thus frustrating one of the cardinal purposes of suppression in the first instance.

If, and there doesn't seem to be any room to argue about it, the guarantee of the Fifth Amendment of the United States Constitution is that a defendant in a criminal case may never be compelled to incriminate himself, then that guarantee is secured by the Court's affirmance of this case and those decided by its principle. Once the statement is declared to be inadmissible it is no longer any evidence at all of the truth or falsity of what it contains and hence is not in any sense incriminatory. It may not be used in any way to show guilt, because its use is solely to impeach credibility. Consequently the guarantee of the Fifth Amendment is fully preserved. However, it is quite a different matter to insist that the Fifth Amendment guarantees that a criminal defendant may with complete impunity lie.

The petitioner argues that the underlying thesis of *Walder* has been overruled in that testimony given by a defendant in attempting to secure a Constitutional right may not be used against him, *Simmons* v. *United States,* 390 U. S. 377, 19 L. ed. 2d 1247, 88 S. Ct. 967. Our first reaction to that assertion is to point out that in *Simmons* the Garrett testimony was admitted into evidence. Since *Miranda* says the same thing, it is difficult to conclude that one has any greater effect on *Walder* than the other. Our second reaction is to cite the well known case of *Raffel* v. *United States,* 271 U. S. 494, 70 L. ed. 1054, 46 S. Ct. 566. In that situation a prohibition agent testified that after he

had searched a drinking place the defendant had admitted owning it. The defendant did not testify and the jury failed to reach a verdict. At the second trial, the same agent gave the same testimony, only this time Raffel took the stand and denied the admission. On cross-examination, he was asked why he had not testified at the first trial, and the trial court overruled his objection and required him to answer. This Court affirmed, holding:

> "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify."

Raffel v. *United States, supra,* 271 U. S. at 499.

Raffel has, as far as we can determine, remained the law right up to the present, having been relied upon by this Court in 1957, despite a strong dissent which would have overruled it, *Grunewald* v. *United States,* 353 U. S. 391, 1 L. ed. 2d 931, 77 S. Ct. 963, and again in 1961, although distinguished by the Court from the facts of that case, *Stewart* v. *United States,* 366 U. S. 1, 6 L. ed. 2d 84, 81 S. Ct. 941. Unexpectedly, it is even endorsed by the Fifth Circuit, *Sharp* v. *United States,* 410 F. 2d 969, which somehow nonetheless questions the continued efficacy of *Walder, Breedlove* v. *Beto,* 404 F. 2d 1019, 1022-1023.

The petitioner has gone to some pains to indicate what in his judgment will be the result of this Court's affirmance of this case, and it might be well if the respondent were to address itself to these complaints.

(A) The respondent argues that the ruling appealed from provides ever widening avenues down which the police may proceed to secure unconstitutional evidence. What he seems to have overlooked is that unconstitutional evidence, because it is unconstitutional evidence, may never be *admitted* as evidence, either directly or as a source of impeachment. Furthermore, as we have pointed out, police officers don't want and do not seek to acquire involuntary confessions because by definition they are useless for any purpose. Furthermore, our own experience, and we venture to suggest that it is also the Court's, indicates that where the product of searches and interrogations has been found wanting, it has not been because the police have sought means of circumventing the mandates of this Court and been caught at it. Rather, in the overwhelming majority of cases, the deficiency in the conduct of the police has been occasioned by a sincere, albeit unsuccessful, attempt to follow those mandates. *United States v. Spinelli*, 393 U. S. 410, 21 L. ed. 2d 637, 89 S. Ct. 584, is an ideal case in point. One gets the distinct impression from *Spinelli* that the F. B. I. had him under constant surveillance and only gave it up when they were sure they had complied with all of the appropriate requirements. To conclude that the police are in search of sophisticated ways of violating this Court's directives is both unfair and unwarranted.

(B) The petitioner next complains that this ruling of the Court of Appeals leaves no way of vindicating the violation of his constitutional rights. In what way, we would reply, was the violation of Sam Walder's rights vindicated?

(C) The petitioner also argues that the Court of Appeals has required him improperly to choose between his right to testify and his right not to incriminate himself. This is an adroit way of saying that he has an inalienable right to lie under oath. Over two hundred years ago Soli-

citor General Murray in *Omychund* v. *Barker*, 1 Atk. 21, 34, gave what we submit is a highly discerning assessment of any such right. He said:

> "No country can subsist a twelvemonth where an oath is not thought binding, for the want of it must necessarily dissolve society."

In a slightly different context, the Supreme Court of Errors of the State of Connecticut said in *Curtiss* v. *Strong*, 4 Day 51, 56 (1809):

> "There can be no doubt but that the law intended, that the fear of offending God should have its influence upon a witness to induce him to speak the truth. But no such influence can be expected from the man who disregards an oath. He is, therefore, excluded from being a witness."

In sum, a defendant has no more right to lie than has any other witness. The respondent is not so naive as to assume that defendants take the stand and uniformly tell the truth, but to keep faith with the sanctity of the oath they must surely be impeachable in every reasonable way if they defy the obligation the oath puts upon them to tell the truth. It seems to us that the petitioner is in an odd position here. If he takes the witness stand to the tell the truth—or even a lie which is consistent with the prior statement—then he has no reason to fear impeachment. If, on the other hand, he takes the stand to lie, then perhaps the wisdom of the common law was superior to ours: perhaps a criminal defendant is, as a witness, unworthy of belief in the first instance, and he should be prohibited from testifying at all.

(D) Next the petitioner argues that permitting the prosecutor to use the inadmissible statement only to impeach sidesteps this Court's ruling in *Jackson* v. *Denno*, 378 U. S. 368, 12 L. ed. 2d 908, 84 S. Ct. 1774. That, how-

ever, is not a valid objection because voluntariness may be explored out of the presence of the jury at any time, probably when the statement is first referred to for impeachment purposes. If the question of voluntariness is decided adversely to the prosecutor, he may not use the statement to impeach, that's all, so such a procedure does not, as the petitioner argues, "avoid a possible adverse determination" (Petitioner's Brief, p. 17). Nor should it come as any great surprise to the defendant, or his attorney either, for that matter, that the district attorney has his confession, admissible or otherwise. Who better than he should know if he has confessed?

(E) The petitioner suggests that this procedure is unrealistic in the same sense as the procedure condemned by *Bruton* v. *United States*, 391 U. S. 123, 20 L. ed. 2d 476, 88 S. Ct. 1620. This is not the same thing as *Bruton* at all. In *Bruton*, one defendant was condemned out of the mouth of his co-defendant, and this Court simply held that in such a situation they should not be tried together. Here the jury is just being cautioned that the defendant-witness has not always told the same story and that they are permitted to know that, not so they may choose which of the two versions they believe, but so that they may decide whether or not they believe what he has testified to. The net effect in practice is that if the jury disbelieves his testimony, they are going to convict him in all likelihood. That is the value to the prosecution of the exculpatory, though contradictory, statement. The jury is not being asked to select one theory of acquittal over another; they are being asked if they can believe this defendant *at all*, no matter what he says. It is nothing but the *falsus in uno, falsus in omnibus* doctrine, and bears no relationship to *Bruton* whatsoever.

The petitioner makes an interesting argument as to why the County Court charged the jury on the question of agency. It is his thought that the Court could not put out of its mind—and therefore logically neither could the jury

—the substantive evidence of the impeaching statement. It is, as we say, an interesting argument, but it is inaccurate. Right about that time or shortly before, the Appellate Division, Second Department, of the New York Supreme Court decided *People* v. *Miller*, 24 A. D. 2d 1023, 267 N.Y.S. 2d 170. Although there was not a scrap of evidence in that case which would tend to establish an agency relationship between the defendant and the undercover police officer, the defense requested an agency charge to the jury. The Court declined to give it, and the Appellate Division held that refusal to have been error. From that point on in all undercover narcotics cases the County Court of Westchester County and all its judges routinely, and even in the absence of a request, included the agency relationship in the charge to the jury whether it appeared to be called for or not. That it did so in this case had nothing to do with the impeaching statement, for it was done in every case. More than that, though, there is substantial authority in New York that the Court is required to charge any defense which might be demonstrable from the prosecutions's case, *People* v. *Steele*, 26 N. Y. 2d 529, and surely an agency relationship might have been found to exist between Bermudez and the petitioner. In consequence he was entitled to have the Court give the jury that instruction.

(F) The petitioner argues that the adoption of the rule we urge would create an imbalance as between the experienced criminal and the neophyte. Certainly it would; we don't argue that. So, however, does *Miranda* v. *Arizona*, *supra*, and the insulation provided in each case is the same: inadmissibility of the resultant statement.

(G) The petitioner then argues that this rule would put State courts in the position of violating rather than enforcing constitutional rights. With that we cannot agree because it makes an assumption we do not accept; that this Court is going to stamp this procedure illegal. The

State courts will be protecting the defendant's constitutional rights when they have ruled any such statement as we are here discussing inadmissible as evidence. He has a constitutional right not to have an inadmissible statement considered on the question of his guilt, but he has no right to use it as a shield for perjury. Inasmuch as the dominant theme of the *Walder* case was perjury and because perjury looms so large in this case there is attached hereto as Appendix "A" the complete transcript of the colloquy between the petitioner's attorney and the Court taken from the sentencing minutes on December 20, 1966, where the nature and extent of the petitioner's attempts to lie to the Court are discussed at length.

(H) Then the petitioner makes a sort of an amorphous argument that this rule creates "a haphazard and unequal application" of certain rules of law. That we contest vigorously. Either a thing may be done or it may not. In this specific context either the inadmissible statement may be used to impeach or it may not. There is nothing haphazard or unequal about that. It is a rule of law like every other rule of law.

(I) The petitioner complains that the application of the Harris rule tends to suggest that the defendant either lied when he gave the statement or lied when he testified. *That is precisely the point!* That is its sole function. When the prior statement is adverted to, it is being used to impeach his credibility. But, the petitioner says, you can't determine constitutionality by that means. What he forgets is that we are no longer trying to prove constitutionality. If constitutionality were the criterion, the statement would be permissible for *every* purpose, not just impeachment. To get to the question presented here, one must presume that *Miranda* has been violated and go on from there.

(J) The petitioner makes further reference to *Burgett* v. *Texas, supra,* where the prosecutor made reference to an

unconstitutionally secured prior conviction. As we pointed out (Point II, *supra*), the conviction was an indispensable part of the prosecution's direct case, and it was admitted into evidence on that direct case as a part of the substantive proof. In the analogous situation concerning an inadmissible statement, the *Miranda* rule accomplishes the *Burgett* result, and, as we have argued throughout, the statement used only for impeachment violates neither of those cases.

(K) The petitioner finally points out that the question of voluntariness was never submitted to the jury. Clearly this was not possible because there is absolutely no way a jury can assess the voluntariness of a statement the whole of which they have never seen. As a matter of fact, what the jury did hear in this case omitted entirely any of the elements by which they could have found it voluntary. For example, they were never told that the petitioner was advised of his right to remain silent, they were never told that he was warned that what he said could be used against him, and they were never informed that he was given an opportunity to phone a lawyer (Compare, pp. 57-65 with pp. 72-74). In short, this jury was incapable, as any jury would be incapable, of making an informed determination that such a statement was or was not voluntary. It must necessarily follow that a different rule applies to the impeaching statement than does to the admissible statement.

Despite the many objections voiced by the petitioner about the propriety of permitting the prosecutor to cross-examine him by the use of his prior inadmissible statement, it is submitted that he has suggested to the Court no reason why its ruling in *Walder* v. *United States, supra*, was illegal, improvident or essentially wrong, and in consequence has provided the Court with no ground for reversing *Walder*.

POINT IV

The use to which the petitioner's statement was put was in no way prejudicial.

The petitioner's claim here is that too much of the statement was quoted from in the jury's presence and that much of it was not collateral. The first claim, it is submitted, is specious. As we count them, the prosecutor asked him if he remembered being asked and giving answers to thirty nine questions (57-65). The statement itself, however, contains ninety eight questions and answers (72-78), and that, it is submitted, effectively lays to rest the petitioner's assertion that his prior statement "was used virtually in toto" (Petitioner's Brief, p. 19). More than that, though, to the prosecutor's question, "Do you recall being asked these questions and giving these answers?" which was asked a grand total of seventeen times, the petitioner replied negatively twelve times, affirmatively once, and evasively the remainder of the times. Inasmuch as the prosecutor was not bound by the witness' answer, *People* v. *Sorge,* 301 N. Y. 198; *Iva Ikuko Toguri D'Aquino* v. *United States,* 192 F. 2d 338, 9th Circ., cert, denied 343 U. S. 935, 96 L. ed. 1343, 72 S. Ct. 772, it was perfectly proper for him to continue this line of questioning, and its duration is in many way the fault of the petitioner himself.

As to the distinction the petitioner seeks to draw between direct evidence of the crime presented by his statement as opposed to impeachment by a statement which deals only with collateral matter, we would reply that it is probably a distinction without a difference. The question is whether this Court is going to reaffirm the principle it announced in *Walder,* which essentially was that evidence legally or illegally acquired was nevertheless a valid source of impeaching a defendant's testimony. The Court in *Walder* made no pronouncement concerning

whether or not the impeaching material was or was not collateral. There it was simply expressing its indignation that perjury be thought permissible simply because the Government could not disprove it. "Such an extension of the Weeks doctrine," the Court exclaimed, "would be a perversion of the Fourth Amendment." *Walder v. United States, supra,* 347 U. S. at 65, 74 S. Ct. at 356.

Perjury is still the same predator against the integrity of the judicial system it was in 1954. It hasn't become any more benign, and, respectfully, there is no sensible reason why this Court should attenuate its standards on perjury by laying over it the mantle of judicial approval simply on the basis of what it is being used to conceal.

POINT V

The use of the inadmissible statement could well be harmless error.

When this case was in the New York Court of Appeals, the respondent conceded that the use of this statement was not harmless error. The reason for that concession was that we wanted a clear cut ruling from the Court of Appeals. Here, however, we withdraw that concession, for a couple of reasons. We feel, first, that we owe that much consideration to the learned justice of the Appellate Division who held that if it was error it was harmless. Secondly, whereas the respondent appeared before the Court of Appeals as its own representative and possibly for the sixty one other district attorneys in New York State, we appear before this Court as potentially the representative of thousands of prosecutors who will be directly influenced by this Court's decision, and we have a certain obligation to them to attempt to secure any favorable ruling which the Court might be disposed to render.

It is the petitioner's thesis under this point that the two counts of the indictment, i.e., selling heroin on January 4th (first count) and selling heroin on January 6th (second count) were disposed of differently because of the way in which the statement was used. We believe and submit to the Court that, if anything, the fact that the jury convicted on count two and failed to agree as to count one proves just the opposite.

If we begin by evaluating the case minus the statement we see that the two undercover detectives testified as to the first count that the petitioner had sold them a substance on January 4th which they later took to a laboratory. The chemist then testified that the substance so delivered to him was analyzed by him and found to be heroin. As to the first count, the petitioner testified that no transaction of any kind took place on January 4th between himself and the detectives and that on that evening he had sold them nothing whatsoever. As to the second count, the same detectives testified that again on January 6th he had again sold them a white powder which again they took to the laboratory. The chemist again testified that he had examined this powder and found it to be heroin. So far it's the same case, isn't it? But now we come to the radical difference. Now, rather than denying that transaction, *the petitioner admitted it.* His story was that the white powder he had sold the detectives was not heroin but baking powder. Now, of course, the focus of credibility had changed. If there was a certain reluctance, as apparently there was, to believe the detectives without corroboration, that corroboration had now been supplied out of the petitioner's own mouth. In this situation, then, the petitioner was not pitting his credibility against that of the detectives but against that of the chemist. That, because of the precision and the delicacy of the chemist's work and also, perhaps, because of his greater detachment than that of the detectives, made him a far more credible witness than they, and that seems to have been enough.

Now, if we go back over the case including the statement as it was used, we see that it didn't affect the outcome at all, for, although enough of it came to the jury's attention to constitute a full confession as to the first count (fol. 449-fol. 452, pp. 58-60), they could not agree. As a matter of fact, it seems to have failed of the very purpose for which it was utilized, that of impeaching the petitioners' credibility, for by their disposition of the first count the jury almost expressly stated that they could not brand his testimony as false. There is no reason for believing that they gave it more weight as to the second count.

The petitioner argues that the fact that he took a "taste" of the "baking powder" had to show the jury that it was heroin and he knew it was heroin. That doesn't necessarily follow at all. Here we have a man who has just sold to another man whom he believes is a narcotics addict a nickel's worth of baking powder, and he has charged him twelve dollars for it. For this man, an admitted narcotics addict, the refusal of the proffered "taste" would have been suicidal, for it would have exposed the fraud on the spot. There isnt' anything startling, therefore, in the petitioner's having taken back a "taste" of the baking powder.

The petitioner would be infinitely better off arguing reversible error before this Court if the jury had convicted him under both counts because there would always be some doubt in that event what contribution the statement had made. In the present case, we are able to observe from their disparate conclusions that they gave the statement no weight at all.

POINT VI

The District Attorney was under no obligation to notify the petitioner in advance of his intention to use the statement for impeachment purposes.

The petitioner here complains that in terms of the New York Code of Criminal Procedure, §813-f, the District Attorney was required to notify him in advance of his intention to use the statement. For the Court's convenience, there follows the text of Section 813-f, together with that of Sections 813-g and 813-h:

> § 813-f. Confessions and admissions; notice before use. In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel.
>
> § 813-g. The motion in general. A person claiming to be aggrieved by an involuntary confession or admission may move for the suppression of such confession or admission from use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.
>
> If the motion is granted, the confession or admission shall not be admissible in evidence in any criminal proceeding against the moving party. The order granting such motion may be reviewed on appeal.
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.
>
> § 813-h. Time of making and determination. 1. The motion shall be made returnable with reasonable diligence after receipt of such written notice from the people and prior to the commencement of any trial in

> which the confession or admission claimed to have been involuntarily obtained is proposed to be offered as evidence. If more than one defendant is named in the indictment, information, complaint or charge, the moving party shall serve the notice of motion and all the papers upon which it is made, upon each co-defendant, or upon his counsel if the co-defendant is represented by counsel. The trial shall not be commenced until the motion has been determined.

The petitioner has suggested that the District Attorney was required to notify him of his intentions to use the prior statement and to have a hearing as to its voluntariness. This argument, though, tends to devour itself. If it be pursued to its logical conclusion, it would mean that we should have sent him the notice provided for by the Code of Criminal Procedure, Section 813-f, and presumably he would have demanded the hearing provided for by Section 813-g. Assuming that the Court had found the statement to have been illegally obtained, and most assuredly he would have under the authority of *Miranda* v. *Arizona, supra,* the net outcome would have been that he would have ruled it inadmissible. However, without ever having had recourse to that judicial process, the District Attorney drew the same conclusion as to the admissibility of the statement and voluntarily suppressed it as evidence. That suppression puts the petitioner right where he would have been following the Sections 813-f and 813-g procedures if they had been decided most favorably to him. Nonetheless, he insists that he was prejudiced. It would appear that he is far more interested in the route than in the destination.

The fact is that no confession or statement was ever admitted into evidence. It was never the respondent's intention, in the words of Section 813-f:

> ". . . to offer a confession or admission in evidence upon a trial . . ."

against this petitioner, so the notice commanded by that section was unnecessary.

Moving, then, to voluntariness, the question of voluntariness was never raised at the trial, and it is submitted that this is a little late in the season for it to be raised now. Surely had the point arisen, the trial court in the jury's absence could have held the brief hearing which might have been necessary to resolve this question. We say *might* have been necessary, because on its face there is surely no flaw in the voluntariness of this statement. Petitioner was given all three of what, for want of a better word, might be called his *Escobedo* warnings, and he consciously and deliberately waived each one.

In summary, then, and despite every other consideration, this case turns largely on the Court's attitude towards *Walder* v. *United States, supra,* and it is submitted that nothing the petitioner has put before the Court warrants a renunciation of the thoroughly sound legal principle the case represents. If we examine *Walder* in some detail, it will immediately be apparent that the illegal search conducted by the federal agents violated Walder's constitutional rights, i.e., those accorded to him by the Fourth Amendment to the United States Constitution. So this Court ruled both before *Walder, United States* v. *Jeffers,* 342 U. S. 48, and after, *Mapp* v. *Ohio,* 367 U. S. 643. In its *Walder* holding, it must reasonably be concluded, the Court was sanctioning the use for impeachment of a defendant on cross-examination of unconstitutionally secured material.

To go back, then, to these cases and, respectfully, these Courts which will neither forthrightly reject *Walder* nor apply it, their failure fully to endorse it is inexplicable because the *Miranda* problem is identical. When a defendant is interrogated under circumstances where he is entitled to the *Miranda* warnings and yet they are not given to him, his constitutional rights have been violated. While

Walder's Fourth Amendment rights have been abridged, this petitioner's rights under the Fifth Amendment have been transgressed. Yet there appears to be this puzzling reluctance in the latter class of cases to accept this Court's *nihil obstat* concerning the use of of such unconstitutionally acquired material to impeach a defendant if he chooses to perjure himself.

CONCLUSION

The judgment of the New York Court of Appeals should be in each and every respect affirmed.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of
Westchester County.

BY: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
of Counsel.

October 7, 1970.

Appendix "A".

The Clerk: Viven Harris, do you have any further legal cause to show why sentence should not be pronounced against you at this time?

Mr. McHugh: Not in addition to those already urged, Your Honor, at this time.

The Court: Mr. Harris—

Mr. McHugh: Your Honor, I'm not so—I would want to be heard, though, on the question of the sentence.

The Court: Yes, all right.

The Clerk: Does counsel wish to address the Court?

Mr. McHugh: Yes. I was waiting for the customary question. Your Honor, Viven Harris, as you know, having examined the probation report and heard all the testimony herein, is a man 23 years old. Candor would compel me to say, though, he's not an attractive individual and hasn't had a wonderful background. He's been convicted of some violations, as your Honor knows. But the question is now, of course, not whether or not he is attractive, but what can and should be done for him. And Your Honor, there is no question, no question in my mind, and I think I know quite a bit about the New Rochelle drug situation from the number of defendants we've represented in it, the number of people we have interrogated who weren't even in it directly as defendants, that Viven Harris was one of a number of narcotic addicts who, for reasons best known to himself, Commissioner Carey decided to eliminate by having imported Detective Bermudez and Detective Parks from New York City to do their business. Now, I don't want to denegate their work unduly, but it seems to me, it seems to me some kind of an extreme application, if you will, of the law for a detective to run around, make buys, as we say in the vernacular, of narcotics from these junkies, and that's all they were, then to come into court and they are held under a sales statute,

which is very severe, Your Honor, much more severe than the Federal Law even, concerning narcotics, in a number of respects. Now, Your Honor, Viven Harris has been convicted, and I won't belabor the facts here, you heard all that at the trial, but I submit to you at the time of the sale and the time of his arrest, he was a narcotics addict. That is verified after medical and psychiatric findings that he was an addict and he was admitted to the hospital and he didn't have the good sense to stay with that and he took off. He's not a man with great sense and balance. I suppose if he were, he wouldn't be a narcotics addict in the first place. So he's had all these problems, and what term is appropriate, I daresay nobody can say precisely the number of years that's going to be required to help Viven Harris, if years at all can help him, to become a decent and law abiding citizen. But I would respectfully call to the Court's attention that prior to this trial, the District Attorney's Office had offered us to accept a plea of attempted felonious possession of a narcotic drug under 1751(3) of the narcotic law; and under that statute he could have received a sentence with a minimum of 1½ years and a maximum of 5 years. Therefore, I submit, Your Honor, that although now there is a potential minimum of 5 years, that to add any great burden to that would in effect be punishing him for going to trial. Other judges have commented on that. I needn't belabor it. I think for a man to put the State to its proof, although in some cases I know it, he is punished severely and punished harshly; I personally think it's a great wrong. If the man says I wanted to interpose and try out the issues, even if he's found guilty, I don't think he should be treated much more severely than if he pleaded guilty. He saved the expense of a trial, I suppose, if he pleaded guilty, but that's about the size of it. Taking all those things into account, Your Honor, and taking into account the very severe statute here, I do ask you to be as lenient as possible.

The Court: Mr. McHugh, may I say this for the benefit of the defendant. I don't subscribe to the argument that he, the defendant, could have pleaded to an attempt in this case and received a lesser sentence; and that by virtue of having gone to trial he, the defendant, was simply in the fulfillment of his rights. I don't agree to this. If you will accept my statement, that in fulfillment of a right, candor and truthfulness are concomitants of this right; and to commit perjury and to deliberately lie in a courtroom does not entitle a defendant to have this Court consider that he was exercising his rights. I watched this defendant in this courtroom and I felt sorry for him. I am aware he is a person of very limited background. I am aware that coming from an environment that he did down South and his difficulties down South, that these perhaps might have been little more severe in the handling of this defendant in his early days than he appears before the Court now. I am also aware that I don't think he has any concept of, morally, of peddling heroin.

Mr. McHugh: Of what, sir?

The Court: Of selling the heroin. I don't think he has any concept of it as you do or I do. I just don't think that he has a moral judgment than that he had, having been an addict. I am aware, of course, you and I both have to feel sorry for him. But the one thing he did do when he stood up in the middle of that trial and deliberately tried to create a mistrial, I am not satisfied that this defendant had any feeling that he was doing anything but seeking to hoodwink a jury.

Mr. McHugh: Your Honor, may I say something in that connection?

The Court: Yes.

Mr. McHugh: You know, it wasn't very enjoyable for us; of course, I didn't try the case, Mr. Projansky did.

The Court: Yes.

Mr. McHugh: And he was the subject of all this and it was very unfortunate, but it is my impression and I

could be wrong, that Viven Harris doesn't have the imagination to conceive—

The Court: I am much aware.

Mr. McHugh: And conceive and do the things that he did.

The Court: I am much aware that somebody, that this isn't anything of an original thought on his part.

Mr. McHugh: Right. He has come under the influence of John Smith and other jailhouse lawyers who are there, who are putting these people up to these things. He had some notes in his possession from John Smith and I think, your Honor, without judging his testimony since I didn't hear all of it, that if, and your Honor certainly did, and I bow to your Honor's characterization of it, but he said things and did things in the trial on the stand which were improper, and I certainly think they were, that he did it in mitigation, I may say, because he chose to listen to the advice of some of these jailhouse lawyers.

The Court: This is correct. And therefore, don't you see, and this is what I am saying to you, that he had a choice. He had a choice, as far as we are all concerned here, and that choice was up to him, completely. He had the benefit of your advice; I have no idea of what that is. He has had prior experience with the law. He had the choice. We didn't have the choice in here under any circumstances at all and this is the election, and this isn't what—now he comes in and says I took my right to trial and you should not penalize me. I am not penalizing him for that. He made the choice. I am not satisfied, however, that if the defendant was similarly placed at a later time will identically do the same thing, and I feel that in the past record, in his conduct, that he has time to serve. It is the Judgment of the Court that he will be sentenced to the Sing Sing State's Prison for a term the minimum of which will not be less than 6 years and the maximum of which will not be more than 8 years.

Mr. McHugh: Eight years, your Honor?

The Court: Yes.

Mr. McHugh: Thank you, your Honor.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 206

VIVEN HARRIS,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

FRANK S. HOGAN
District Attorney
New York County
155 Leonard Street
New York, New York 10013
RE 2-7300

MICHAEL R. JUVILER
SYBIL H. LANDAU
Assistant District Attorneys
Of Counsel

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BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

Question Presented

Whether in a trial held after *Miranda* v. *Arizona*, the prosecution may impeach the credibility of a defendant who has affirmatively resorted to perjury, with a pre-*Miranda* statement that is not available as direct evidence of guilt.

Interest of *Amicus*

Amicus is the District Attorney of New York County, the authorized law officer of a political subdivision of the State of New York. *Amicus* files this brief in support of an affirmance of petitioner's conviction because the issue presented involves the integrity of the jury's function as a fact-finding body in criminal trials. The decision of the court below safeguards that function. A rejection of the New York rule will not only encourage defendants to commit perjury, it will cripple the jury's ability to arrive at a reliable assessment of a defendant's credibility. It would be wrong to permit a defendant to exploit a constitutional benefit as a shield behind which to mislead the jury as to the truth, particularly where, as in petitioner's case, the incriminating statement was obtained lawfully under standards deemed constitutional at the time of the questioning. Because of our concern that this Court reaffirm its decision in *Walder* v. *United States,* 347 U.S. 62, condemning a defendant's resort to perjury, we submit our brief as *amicus curiae* in support of the decision below.

Statement of the Case

The petitioner, Viven Harris, was tried in the County Court of Westchester County, New York, on an indictment charging him with twice selling a narcotic drug, heroin, to an undercover police officer, Detective George Bermudez. The petitioner was convicted, after a two-week trial (DEMPSEY, J. and a jury), of having sold narcotics on January 6, 1966, the second count in the indictment. The

jury were unable to agree upon a verdict under the first count, charging that petitioner had sold heroin on January 4, 1966. Petitioner was sentenced on December 20, 1966, to State Prison for a term of not less than six years nor more than eight years.

At the trial Detective **George Bermudez** testified for the People that he is assigned to the Narcotics Bureau of the New York City Police Department and, as part of his assignment, he has worked in an undercover capacity for the past 10 years (83-6).* In early December, 1965, Bermudez and his partner, Richard Parks, met with Edward Carey, Commissioner of the New Rochelle Police Department, who had formerly been the Chief Inspector in Charge of the New York City Police Department's Narcotic Bureau and Detective Bermudez's boss in New York City (88-90). As a result of that meeting, Bermudez and Parks commenced an investigation on December 6, 1965 into the illicit narcotic drug activity in the city of New Rochelle. For the purposes of the investigation, Bermudez assumed the name Joseph Vegas and Parks the name Eddie Que (90).

During the course of this investigation, Detective Bermudez was introduced to the petitioner Viven Harris, on January 4, 1966 at approximately 6:30 p.m., inside the Three-Fours Bar and Grill. Bermudez and Parks were sitting with some friends, acquired during the investigation, when Harris approached one of the group with an offer to sell a guitar. The man said, no, and pointed to

* Numerical references are to pages of the typewritten record of the trial, which was reviewed by the Court of Appeals and is before this Court, having been transmitted by the Clerk of the Supreme Court, Westchester County.

Bermudez, who then expressed interest. Harris explained that he had just gotten an electric guitar and was willing to let Bermudez have it, as well as its case, for $35. Bermudez instructed Parks to go with Harris and inspect the guitar. After waiting ten minutes for the two men to return, Bermudez and his friends left the bar. As they crossed the street, however, Parks and Harris reappeared. Parks reported that the guitar was only worth $25. Bermudez told Harris that he had to go some place, but would return immediately and would then like to inspect the guitar for himself. Harris expressed great reluctance about waiting; he said he was in a hurry, that he had to "go downtown and score a half-a-load"—a vernacular expression meaning to purchase 15 decks of heroin. Eventually, however, Harris agreed to await Bermudez's return and they arranged to meet in a laundromat (90-5). Harris, however, was not at the laundromat when Bermudez returned and Bermudez, rather than wait for him, went back to the Three-Fours Bar and rejoined Parks.

An hour later, Harris entered the bar, approached Bermudez and asked what had happened. Bermudez protested that he had kept the appointment, to which Harris responded, "I told you I had to go downtown to get a couple of half-loads." When Bermudez again expressed interest in the guitar, however, Harris said that it was in his home and that he would take Bermudez to see it. The two men then left the bar and drove in Bermudez's car, to Harris's apartment (95).

En route to the apartment, Bermudez asked Harris "What was happening?" meaning, do you have any heroin. Harris replied by asking Bermudez what he wanted, and

Bermudez said he would take a half-a-load. Harris, explaining that he had been out of action for a while and had only just started again, said, "I can't let you have a half-a-load unless I speak to my partner Al Payne," but offered to let Bermudez have a "bag." Bermudez said, "All right, we'll talk to Al" (95-6).

When they arrived at the house, Harris brought Bermudez into the apartment and showed him the guitar. After some haggling over the price, Harris agreed to sell the guitar for $25 and Bermudez handed him a twenty-dollar bill and a ten-dollar bill. Harris pocketed the money without giving Bermudez his change (97).

Downstairs, Bermudez stored the guitar in the trunk of his car, then the two men walked around the corner to a poolroom where they found Al Payne (97-8). Harris told Payne that Bermudez wanted a half-a-load and was willing to pay $35 for it. Bermudez immediately said "hold it," $35 was too much, he would not pay more than $30. After a brief argument over the price, Payne said, "Listen, hey, forget about it," and walked back into the poolroom (98). Bermudez and Harris then returned to the car. On their way, Harris explained that he could not sell Bermudez a half-a-load for less than $35 without losing money, but that he would let Bermudez have one bag for $7. Bermudez again balked at the price and Harris finally agreed to let him have one bag of heroin for $5. Telling Bermudez to wait downstairs by the car, Harris went upstairs to his apartment. A few minutes later, Harris emerged from the building and handed Bermudez a glassine envelope containing a white powder (98-100). Bermudez

placed the envelope in his pocket and drove back to where he had left Detective Parks and his other companions. After standing around for awhile, he and Detective Parks drove to a pre-arranged location, where Bermudez signed and sealed the glassine envelope. Later, this envelope was delivered to the police laboratory (99-101, 112-17; Exh. 2), where it was chemically analyzed by Detective **Frank Schurr**. The analysis revealed that heroin was present in the glassine envelope (279-85).

Two days later, on January 6, 1966, Bermudez saw Harris again. At approximately 8:25 p.m., Harris entered the Three-Fours Bar and walked over to Bermudez. Harris inquired, "What's happening?" and Bermudez said, "Nothing, it's quiet." They spoke in general terms about a mutual acquaintance who was getting established, and then Harris asked if Bermudez wanted anything. Bermudez said, "Yes," that he would like "a couple of bags." A brief argument over the price followed, Harris asking for $7 and Bermudez refusing to pay that much. Finally, Bermudez said he would go as high as $6, but no higher. Harris agreed and, after telling Bermudez to wait for him because he had to go back to his apartment, Harris left the bar (117-19).

When Harris returned, approximately twenty minutes later, he again approached Bermudez and said, "Look, I want to talk to you, Joe. Come on outside." Bermudez followed Harris outside and the two men got into Detective Bermudez's car, which was parked in front of the bar. Harris handed over two glassine envelopes and Bermudez paid him $12. After a brief conversation, during which Harris tried to solicit Bermudez to sell

narcotics in New Jersey for Harris's organization, the two men got out of the automobile and returned to the bar (119-23). Later, Detectives Bermudez and Parks left the Three-Fours Bar and drove to a pre-arranged location, where Detective Bermudez signed and sealed the glassine envelopes. Subsequently, Detective Bermudez delivered the two glassine envelopes to the police laboratory for analysis (122-6, 128-9; Exh. 4). The chemical analysis, performed by Detective **Schurr**, revealed that heroin was present in each of the two glassine envelopes (285-90).

The next day, January 7, Detective Bermudez saw Harris on Lincoln Avenue and invited him into the car. Harris accepted and, after they had driven down the Boulevard, Detective Bermudez informed Harris that he was a police officer and that Harris was under arrest for violation of Section 1751 of the [former New York] Penal Law. Harris was then turned over to the New Rochelle police (131-2).

On cross-examination, Detective Bermudez testified that there was no "panic" in New Rochelle during December, 1965, and January, 1966. "Panic" means that you cannot get any heroin at all, that it is in short supply, there is a shortage of drugs on the market (238).

Detective **Richard Parks** of the Narcotics Bureau of the New York City Police Department testified that for the purpose of this investigation he assumed the name of Eddie Que (314-18). He met Viven Harris for the first time during the early evening of January 4, 1966, in the Three-Fours Bar and Grill in New Rochelle. A little later that evening, Detective Parks had a conversation with Harris

about a guitar. Bermudez instructed Parks to accompany Harris to the latter's apartment and look at the guitar in order to estimate its value. Parks did so, then returned to the bar where he met his partner, Detective Bermudez, who was using the name Joe Vargus (318-21, 329-30). They met outside the bar at Bermudez's car. As he and Bermudez entered the car, Harris asked Bermudez if he wanted the guitar. Bermudez replied that they had to attend to something and Harris said that he also had to leave, he had to go downtown to cop a half-load. However, he agreed at Bermudez's request, to await their return and said he would meet Bermudez in the laundry (321-2).

Detective Parks next saw Harris at approximately 8 p.m. that evening. Harris entered the Three-Fours Bar and had a conversation with Detective Bermudez. Detective Parks was not close enough to overhear what the two men were saying. Harris left the bar, only to return a little while later. Then he and Detective Bermudez left together (320, 322). Twenty-five minutes later, Detective Bermudez returned to the bar (322).

Detective Parks did not see Harris again until January 6, 1966, two days later. It was approximately 8 p.m. and Harris was inside the Three-Fours Bar and Grill in the company of Detective Bermudez. Harris left the bar and returned. Next, Detective Parks observed Harris and Detective Bermudez enter the latter's car, which was parked in front of the bar. Parks watched as the two men spoke and moved toward each other, then went back inside the bar (323-4). A few minutes later, Detective Bermudez reentered the bar (324). An hour later, Detectives Bermudez and Parks left the bar and drove to a specific location where

Detective Parks initialed the tape placed by Detective Bermudez on People's Exhibit 4, the glassine envelopes (324-5).

The petitioner, **Viven Harris**, called as a witness on his own behalf, testified that the first time he had seen Detective Bermudez was in mid-December, 1965 on Sickles Avenue in New Rochelle. They did not speak to one another on that occasion (391). Harris, Al Payne, also known as Alvin Miller, and another friend, Ambrose Rooney, were standing on Sickles Avenue trying to scrape up enough money to buy one bag of heroin for the three of them when Bermudez drove up in a car with Ronnie Sykes and Detective Parks. Bermudez asked Ronnie to ask Harris and his friends to see if they could "cop a bag of drugs" for him and one of them did. Bermudez gave Ronnie Stykes the money, seven dollars, to give to Ambrose; Harris's friends had seven dollars to obtain a bag of drugs for themselves. Harris and his friends went to a house on Sickles Avenue, number 108, and spoke to the Spanish boy, Joe, who answered the door. Joe told them that he had respectable people living there and not to make too much noise if they entered the house. After buying two bags of heroin, they took some of the powder out of Bermudez's envelope and put it in their own bag, "so it would be more for us and less for him." They left the house and handed the bag to Ronnie Sykes, who in turn handed it to Bermudez. Bermudez, Ronnie, and Detective Parks then drove away (396-9).

Harris did not actually meet Detective Bermudez until the early evening of January 4, 1966. Bermudez was sitting in the Three-Fours Bar and Grill with Charlie and Ronnie, who introduced him to Harris as "Joe" (390-2).

They spoke but did not discuss narcotics. About half an hour later, Detective Bermudez asked Harris to go and see if he could obtain a bag of drugs for him. Harris told him that there was a panic on, that he wanted drugs for himself, but that drugs could not be found anywhere. Harris, a drug user since 1961, added that he himself was drinking Robitussin A.C.—a cough syrup containing codeine. Bermudez kept asking and asking, but Harris kept saying that "we couldn't buy no drugs because it was a panic on, it wasn't no drugs to be found," because he needed them for himself (392-5). After a little small talk, and after Detective Bermudez had bought him a beer, Harris left the Three-Fours and went to another bar. He never bought drugs for Bermudez (396).

Harris again saw Detective Bermudez on January 6, 1966, in the Three-Fours Bar. Charlie and Detective Parks were there but they were not sitting with Bermudez (399-402). Bermudez wanted Harris to see if he could buy him a half-a-load of drugs. Harris replied that there was a panic on and drugs could not be bought. Next Bermudez asked, "Could you buy me two bags of drugs?" and again Harris told him there was a panic on (402). Then a friend of Harris's, Henry Stanley, entered the bar and began speaking to Harris. Bermudez asked Stanley if he was "a friend of Viven?" Learning that he was, Bermudez said, "Well, birds of a feather flock together. You know where you can get some drugs at?" Stanley confirmed what Harris had already told Bermudez, there was a panic on and he was drinking terpin hydrate and Robitussin A.C. (402-3). When Bermudez kept asking and insisting, Stanley punched Harris in the side—indicating that he wanted to speak to him privately. The two men spoke together

and then, as a result of that conversation, they left the bar and went to Stanley's house (403-5). Because they believed that Detective Bermudez snorted heroin, Harris and Stanley mixed a baby formula with milk and snorted the combined substance. The mixture did not have any sting, so they tried baking powder. Baking powder, they discovered, had just the right amount of sting to initially deceive a "snorter" and they placed some in two empty glassine envelopes that Stanley "had used the heroin from." The envelopes did not contain any heroin, they were totally empty before the baking powder was placed in them (405-7, 409). Then they returned to the Three-Fours Bar and gave the two glassine envelopes to Bermudez. Harris did not have a conversation with Bermudez at that time (407). They asked Bermudez to buy them a beer and he did so. While they were having their beer, they told Bermudez that the drugs they had given him was the best they could do and might be a little light. When they had finished their beers, Stanley and Harris left for New York to buy themselves some heroin (408-9). On the next occasion when he saw Detective Bermudez, Harris was placed under arrest (409).

Harris further testified that he did not sell any drugs to Detective Bermudez, he had never sold drugs to anyone, and he never had a partnership or business arrangement with Al Payne. He had given drugs to someone, but he did not give any drugs to anyone on January 4, 1966, or on January 6, 1966 (410). He has never discussed drugs with strangers (412).

During the cross-examination of petitioner, the trial court, applying the decision of the New York Court of

Appeals in *People* v. *Kulis*, 18 N.Y.2d 318 (1966), permitted the prosecutor to confront petitioner with a prior inconsistent statement taken on January 7, 1966, shortly after he was arrested (445-8; A 56-7).* In substance, that portion of the question-and-answer statement which was read to petitioner contained a truthful, though undetailed, account of the sale on January 4th. In that statement Harris had admitted driving with Bermudez to get a single glassine envelope of heroin, that Bermudez had known where to go, that Harris had entered the location, which he denied was his own home, that he had remained a total of two minutes, and had returned with a five-dollar bag of heroin which he had given to Bermudez and that the drug had been paid for by Bermudez (448-52; A 57-60). Concerning the events of January 6th, the question-and-answer statement was false. Harris had said that while in the Three-Fours Bar and Grill Bermudez had asked Harris to buy drugs for him, that Harris had walked outside of the bar where he met a boy from whom he bought two five-dollar bags of heroin for Bermudez, that he had reentered the bar and handed the narcotics to Bermudez who had given him twelve dollars and half of the heroin in one of the envelopes (452-6; A 60-3). Both the truthful account of January 4th and the false account of January 6th, conflicted with petitioner's trial testimony. When confronted with his earlier statement, petitioner testified that he was unable to recall being asked any of the questions or giving any of the answers contained in it (449-56; A 58-63). Petitioner attributed this lapse of memory to a "slight concussion" he had sustained

* Numerical references preceded by the letter "A" are to pages of the printed appendix filed by petitioner in this Court. Petitioner's question-and-answer statement (Exh. 6 for ident.) is to be found in his appendix at pages A72 to A78.

four years earlier (458-9; A 64). The prosecutor did not inquire further and the statement was not introduced in evidence.

The petitioner's claim that he could not remember either the questions or the answers left open the question whether he was affirming or denying the existence of the statement. That question was answered by defense counsel in his summation when he conceded that the questions and answers as put to the petitioner in cross-examination accurately reflected the prior statement (501). And defense counsel advised the jury that the court would, as earlier announced (457; A63), instruct them that "any prior statement made by the defendant, presented here in the Courtroom inconsistent with his testimony, can be considered by you only for the purpose of determining how much credibility, how much weight you are going to give his testimony, that it's not independent, separate proof" (498).

The prosecutor, in his summation, argued that petitioner had been lying when he claimed he could not remember either the questions that had been asked or the answers that he had given. Thus, after noting that Harris's trial version of the events conflicted with the testimony of each of the three prosecution witnesses, the prosecutor continued:

> "Those are the things you will have to reconcile. Those are the things that you will have to evaluate to determine who is abusing your intelligence here. I submit to you, Ladies and Gentlemen, that this is incredible. The defendant took the stand and almost a year later, almost a year since January 4th and 6th was able to tell you and describe to you in exact minute de-

tail how Stanley did this with him and they cut it and they snorted and used this and yet when I asked him if he recalled certain questions that I asked him only an hour after his arrest, and less than (twenty-)four hours after the occurrence, I asked him if he recalls giving or being asked these questions and giving me these answers and suddenly, Ladies and Gentlemen, no, no, I am sick, I don't remember, I don't remember these questions, I don't remember these answers. I remember everything my attorney asked me about what happened on the 4th and 6th, but I don't remember questions you asked me and answers I gave you on the 6th. Ladies and Gentlemen, who is abusing your intelligence? Who has the motive here to lie?" (537-8).

The court in its charge, carefully instructed the jury:

"(I)n the course of the interrogation as to the statements purportedly given by the defendant to Mr. Facelle, which Mr. Facelle examined him about, these again, were alleged to have been taken in January 8 (*sic*) 1966, and it was elicited in cross-examination that the defendant's recollections of having given these answers and having been asked these questions, he did not recall them as they were asked by Mr. Facelle. These questions and answers go to the weight and the credibility that you give to a witness's testimony. You may take this into consideration as to whether or not he, the defendant, or any person, has made a prior inconsistent statement, you may take that into consideration into determining how much weight you attach to a witness's testimony. How believable it becomes to you under all of the circumstances; but I caution you again that this is not proof of the defendant's guilt. This goes to the weight, believability of the witness's testimony" (575; A95).

At the conclusion of the trial, the jury found petitioner guilty, under the second count in the indictment, of having sold heroin to Detective Bermudez on January 6, 1966, but were unable to agree upon a verdict under the first count. One explanation for this difference in the two verdicts is apparent. Although the evidence established that Harris had handed the glassine envelope to Detective Bermudez on January 4th and that a price of five dollars had been agreed upon, it did not conclusively resolve the question whether Harris had ever been paid. Detective Bermudez did not give Harris any money when he received the drug, nor did Harris protest or ask for his money. Detective Bermudez explained this by saying that the five dollars was the change Harris owed him on the purchase of the guitar. This must have confused the jury since at the time the guitar was purchased, Bermudez had not yet agreed to buy the glassine envelope. Moreover, when Bermudez paid for the guitar with a twenty-dollar bill and a ten-dollar bill, he did not ask Harris to give him his change. Since the jury were instructed that Harris could not be found guilty if he had acted merely as Detective Bermudez's agent, and thus without profit to himself (576-7) [see *People* v. *Steele*, 26 N.Y. 2d 526 (1970)], this unresolved ambiguity in the evidence rendered the jury unable to arrive at a verdict (591-4).

Summary of Argument

On January 7, 1966, petitioner was arrested and driven to the office of the District Attorney of Westchester County where he was questioned and a voluntary statement was obtained. At the outset of that questioning, petitioner was advised of his right to remain silent and told that anything

he did say could be used against him, but he was not advised of his right to counsel. As a result, when petitioner's trial was held in November of 1966, his voluntary question and answer statement was not used as direct evidence of his guilt on the authority of *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). However, petitioner took the witness stand in his own behalf and contradicted not only the testimony of the witnesses for the prosecution, but his own earlier voluntary statement. The prosecutor, confronted with petitioner's blatant resort to perjury, asked for and was given permission to confront petitioner with the voluntary question and answer statement petitioner had made on January 7, 1966. The jury were then instructed that this prior inconsistent statement could be used only in arriving at an assessment of the defendant's credibility. It could not be used by them as evidence that he was guilty of the crimes charged. The New York courts upheld this limited use of the statement to impeach petitioner's trial testimony on the grounds that while petitioner was entitled to have that statement excluded as evidence of his guilt, he was not entitled to exploit that exclusion as a sword to create an artificial reasonable doubt which would not otherwise have existed.

The New York rule allowing the prosecution to expose a defendant's perjury in a trial held after *Miranda* v. *Arizona*, 384 U.S. 436 (1966), through use of a prior inconsistent statement obtained before *Miranda* safeguards a vital aspect of the jury's role as a fact-finding body and does not encroach upon the defendant's privilege against self-incrimination. The jury is entitled to know that a defendant has willingly given conflicting accounts of the

events covered in his trial testimony; that knowledge is a critical tool in arriving at a correct assessment of his credibility. A rule that kept this knowledge from the jury would disastrously impair their ability to arrive at a reliable determination of the facts in issue, and would lead to an increase in the incidence of unjustified acquittals by encouraging defendants to manufacture perjurious defenses, secure in the knowledge that the prosecution will be unable to expose their perjury. That result is particularly unwarranted where, as here, the statement was clearly voluntary, and lawfully obtained under standards applicable at the time of the questioning.

Since in New York the impeaching statement is used, under limiting instructions, only to discredit the defendant's trial testimony and not to establish his guilt of the crime charged, he has not been compelled to be a witness against himself. Moreover, knowledge that he can be impeached with his prior statement if he testifies, will cause a defendant to think twice before swearing falsely. The only burden this places on the defendant's privilege to testify in his own behalf is the obligation to testify truthfully; there is no constitutional right to commit perjury.

Those courts that have held that a statement that is inadmissible under *Johnson* v. *New Jersey, supra,* cannot be used to expose a defendant's false testimony have misread this Court's opinion in *Miranda, supra.* The issue of impeachment was not before this Court in *Miranda* and that case does not silently disavow this Court's condemnation of perjury in *Walder* v. *United States,* 347 U.S. 62 (1954). The New York rule does not lead to violation of *Johnson*

v. *New Jersey*, supra; there is no substantial risk that the jury will disregard the Court's limiting instruction and use the impeaching statement as evidence of guilt. A prior inconsistent statement, unlike a co-defendant's confession, is not offered as part of the prosecution's proof of guilt and the jury is not asked to pass upon the truth or falsity of its contents. Juries do follow the instruction that their decision is to be based exclusively on the evidence admitted at trial. Moreover, the jury in this case did not disregard the Court's limiting instruction, as is evidenced by its failure to convict on the first count, the allegations of which petitioner admitted in his pre-trial statement. In any event, since the prior inconsistent statement was not obtained in violation of petitioner's right to counsel, even if juries were incapable of following a limiting instruction, the use of the statement to impeach petitioner's credibility did not violate his privilege against self-incrimination. The statement was voluntary under the traditional tests and, therefore, absent a violation of his right to counsel, there could be no violation of the Fifth Amendment attendant upon the impeachment. Selection of an appropriate date for prospective application of *Miranda* v. *Arizona*, was an exercise of this Court's discretion; it did not retroactively alter the validity of the standards under which this statement was obtained. Nor will an affirmance of petitioner's conviction encourage law enforcement agencies to violate the mandates of *Miranda*; law enforcement officials could not have deliberately refrained from complying with procedural mandates this Court had not yet announced were obligatory.

ARGUMENT

The use of a pre-*Miranda* v. *Arizona* statement in a post-*Miranda* v. *Arizona* trial to impeach a defendant's false testimony does not compel that defendant to be a witness against himself.

On January 7, 1966, following his arrest on a charge of selling heroin, the petitioner was brought to the Office of the District Attorney of Westchester County, and questioned by Thomas Facelle, an assistant district attorney, and a statement was obtained. The transcript of that questioning reveals that the petitioner admitted to Mr. Facelle that he had twice secured drugs for Detective Bermudez, on January 4 and 6, of 1966, respectively; only his account of the January 4th transaction was truthful. During that questioning, the procedural safeguards subsequently laid down by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were not followed. The petitioner was advised that he had a right to remain silent and that anything he did say could be used against him,* but he was not informed that he had a right to consult with an attorney. Shortly after peti-

* The typewritten copy of the question-and-answer statement reveals that at the outset of this questioning Mr. Facelle, after identifying the other people present and formally obtaining the petitioner's true name and address, inquired:

"Any question in your mind that you don't have to talk to us if you don't want to? A. No.

"Q. If you do talk to us, you are going to tell us the truth, is that right? A. Yes.

"Q. And if you talk to us and you tell us the truth, you know it can be used against you? A. Uh huh.

"Q. No question about that in your mind is there? A. (Witness shakes head no.)

"Q. Are you going to tell us the truth? A. Yes. I'm going to tell you what I know.

"Q. And what you know is the truth? A. Yes.

"Q. All right. A. From my point of view" (A72-3).

tioner had begun to make admissions as to his involvement, however, he refused to answer any further questions because his responses were being stenographically recorded, and announced, "I'd rather see a lawyer before I keep on." Mr. Facelle replied that petitioner was entitled to consult with an attorney and inquired if petitioner would like "to call one up now." Petitioner answered that he wanted to wait until the morning. However, upon learning that he was charged with selling narcotics, petitioner changed his mind and offered to answer Mr. Facelle's questions (Exh. 6 for ident.; A74-5).* Thus, although the statement was made voluntarily the initial failure to give petitioner timely advice about his right to consult with an attorney did not meet the standards of *Miranda*. Therefore, when this case was tried, in November of 1966, this voluntary question-and-answer statement was not introduced on the People's direct case as evidence of guilt under the authority of this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

Petitioner, however, took the witness stand and testified in his own behalf. In his trial testimony, petitioner went beyond merely denying that he had sold narcotics to Detective Bermudez on January 4 and 6, 1966, and, in an attempt to deceive the jury, petitioner affirmatively resorted to perjury. Contradicting each detail attested to by Bermudez, petitioner swore that the detective had twice begged him to purchase narcotics for him. However, petitioner had not been able to perform this service because there was a "panic" on and there were no narcotics available anywhere.

* At the conclusion of the interview, Harris was asked whether it was "your own decision to talk after you wanted a lawyer?" When the question had been explained to him he answered it "Yes" (A78).

Indeed, petitioner, who was addicted to heroin, had informed Bermudez that he himself was reduced to drinking a cough medicine containing codeine in order to satisfy his own craving for narcotics. However, on January 6, when confronted again with the detective's urgent pleadings and his unwillingness to accept the fact that there was no heroin available to be purchased, Harris had fallen in with a friend's scheme to cheat Bermudez. Harris had accompanied this friend, Henry Stanley, to Stanley's home where, after experimenting with the effect of various substances when "snorted," Stanley had placed baking powder in two empty glassine envelopes that had originally contained heroin. The two envelopes of baking powder were then sold to Detective Bermudez as heroin.

In order to reveal to the jury that this testimony was false, the prosecutor sought to confront Harris with the statement he had made on January 7, 1966. Defense counsel, citing *Miranda* v. *Arizona*, *supra*, objected to the prosecutor's disclosing the existence of this confession. His objection was overruled on the authority of *People* v. *Kulis*, 18 N.Y.2d 318 (1966), and, for the sole purpose of impeaching petitioner's credibility, the prosecutor was permitted to cross-examine Harris concerning this prior inconsistent statement.*

On appeal to the New York courts, petitioner renewed his trial objection that, as a result of the trial court's ruling,

* Although in his direct testimony Harris had purported to remember in detail the substance of his conversations with Detective Bermudez occurring in mid-December of 1965, and again on January 4 and 6 of 1966, during cross-examination he professed himself unable to recall the answers he had given to Mr. Facelle on January 7, 1966, owing to a "slight concussion" allegedly sustained four years earlier.

the jury had been permitted to hear his question-and-answer statement. The thrust of his argument was that since the question-and-answer statement could not be used as evidence of his guilt, it could not be used in an attempt to impeach his credibility as a witness. The Court of Appeals, adhering to its adoption in *People* v. *Kulis, supra*, of this Court's rationale in *Walder* v. *United States*, 347 U.S. 62 (1954), rejected petitioner's argument and affirmed the conviction. The court's reason for arriving at that result is sound. This limited use of the question-and-answer statement did not violate petitioner's privilege against self-incrimination. The statement was not used in any way to incriminate petitioner, it was used only to discredit his trial testimony.

Petitioner's statement could not be introduced as evidence of his guilt because his trial was held after the date of this Court's decision in *Miranda* v. *Arizona*, *supra* [*Johnson* v. *New Jersey*, 384 U.S. 719 (1966)]. But when the petitioner took the witness stand and affirmatively resorted to perjury, no vital interest would have been furthered by forbidding the prosecution to disclose the existence of that statement:

> "[W]hen an accused undertakes by his own sworn testimony to establish facts which would negative or refute his participation in the crime charged, the protection against the use of statements given to police without due regard to constitutional privilege should not close off inquiry.
>
> "In effect the constitutional privilege ought to shield a man against unfairness by the State in using such a statement in his prosecution, but should not immunize him from inquiry when he affirmatively prof-

fers testimony as part of a strategy in contested litigation in which truth is a critical ingredient." *People* v. *Johnson*, 27 N.Y.2d 119, 122 (1970).

This Court has said that the "prime purpose" of the procedural safeguards set forth in *Miranda* "is to guarantee full effectuation of the privilege against self-incrimination." *Johnson* v. *New Jersey*, *supra*, at 729. And that purpose was effectually accomplished at petitioner's trial by excluding his question-and-answer statement as evidence of his guilt. But the petitioner had no additional right to exploit this constitutional benefit as a sword and commit perjury. It is in order to remove this weapon from a defendant's hands that New York permits the prosecution to expose a defendant's perjury by using evidence that is unavailable as part of the direct case.

The acceptance of this rationale by the New York Court of Appeals protects and preserves a crucial aspect of the jury's role as a fact finding body: its ability to assess accurately the credibility of witnesses. The vital importance attached to safeguarding that role is, of course, not open to question. For, as this Court has said: "one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses," *Berger* v. *California*, 391 U.S. 314, 315 (1969), an importance which is not diminished because the witness whose credibility is to be assessed is also a defendant in the trial.

The knowledge that a witness has previously given an account of an event different from the one to which he has sworn at trial is a critical tool in enabling the jury to arrive at a correct assessment of his credibility. [See for example,

Jenks v. *United States*, 353 U.S. 657 (1957) (permitting the government to withhold prior statements if there is a vital interest in preserving their secrecy, but only at the price of freeing the defendant).] There is a direct relationship between a witness's willingness to assert conflicting accounts of an event and the likelihood that his trial version is untruthful. For this reason, the existence of a prior inconsistent statement is an objective, reliable, guide to the correct assessment of his credibility. There is, in fact, no other technique of cross-examination more effective in the exposing of false testimony than confronting a witness with his own prior inconsistent statement.

Conversely, a disavowal of the *Walder* rationale will have a disastrous effect on the jury's ability to arrive at a correct assessment of the defendant's credibility. And this will occur in exact proportion to the importance of the prior inconsistent statement to the individual defendant's credibility. In turn, by reducing the likelihood that the jury can correctly assess the defendant's credibility, it will obstruct the jury's ability to arrive at a reliable determination of the facts in issue through a resolution of conflicting versions of the events. Therefore, if the existence of a prior inconsistent statement is not revealed to the jury, there is a substantial risk that the ultimate finding of fact will be based on a distorted perception of reality. Justice will not be done.

In addition to obstructing the search for truth, a decision by this Court forbidding the impeachment of a defendant who has given false testimony will increase the incidence of guilty defendants who are acquitted. Only in this case the acquittal will not be the result of an insufficiency in the

People's proof but of an unexposed falsity in the defendant's proof. If the jury may not be informed of material in the State's possession that discredits the defendant's trial version of the facts, this will often enable the defendant to create artificially a reasonable doubt as to his guilt. For although the defendant's demeanor on the witness stand may not convince the jury of the existence of the facts proposed by his trial testimony, they would be warranted in voting an acquittal in the absence of impeachment if the existence of those facts is not inherently improbable. Thus if impeachment were to be proscribed on the grounds that whenever a prior inconsistent statement may not be used as direct evidence of guilt it cannot be used at all, this would leave the jury with a defense-manufactured reasonable doubt which would not otherwise exist. Such a rule could only encourage defendants to commit perjury.

Petitioner does not acknowledge the existence of this problem. He argues that the rule adopted by New York "disproportionately places a higher priority upon frustrating an alleged liar than upon vindicating fundamental constitutional rights" (brief, p. 15). On the contrary. Aside from the fact that discouraging perjury should be considered of great value in the administration of justice, the New York rule safeguards the jury's ability to assess the credibility of a defendant who testifies, without impinging upon the substantial rights of any accused. The flaw in petitioner's argument lies in his premise that unless an accused is free to testify falsely he will be unable to testify at all. Permitting a defendant to be impeached with a prior inconsistent statement that is unavailable as part of the State's direct case does not confront a defendant with a "choice," still less an "impermissible

choice between the constitutional right to testify and the privilege against self-incrimination" (brief, p. 16). There is no question of a "choice" because the existence of the prior inconsistent statement is not made known to the jury unless a defendant affirmatively resorts to perjury. See *People* v. *Goldman*, 21 N.Y.2d 152 (1967), *appeal dismissed for want of a substantial federal question, sub nom. Goldman* v. *New York*, 392 U.S. 643 (1968), reh. den. 393 U.S. 643 (1968). The assumption underlying our system of justice is that a defendant who exercises his privilege of testifying in his own behalf does so because he desires to tell the truth.

In permitting the prosecution to impeach a defendant who has attempted to deceive the jury with false testimony, the Court of Appeals has not encroached upon the defendant's privilege against self-incrimination. The impeaching statement is used for one or both of two purposes, each of which is aimed exclusively at discrediting the defendant's trial testimony and neither use compels the defendant "to be a witness against himself." The statement is used either to show that the defendant is not a truthful witness since he has given a different account on an earlier occasion, or it is used, with negative effect, to cast doubt upon the existence of the specific facts proposed by his trial testimony. The significance of a prior inconsistent statement to the jury lies in the defendant's willingness to give conflicting accounts of the events. The impact of this knowledge on the jury's deliberations does not depend on which version of the event is true, but only upon the fact that the earlier statement contradicts the defendant's sworn testimony.*

* The prior statement must conflict with the defendant's trial testimony. An equivocal statement would not be admissible for impeachment purposes.

In fact, it is far more damaging to the defendant's credibility when the prior statement is false, as was petitioner's account of the second sale, than when it is true, and far harder for the defendant to explain away the inconsistency. Neither method of impeachment encroaches upon the privilege against self-incrimination because the statement is not offered for, and the jury is not asked to pass upon, the truth of the contents of the prior statement. It is only when the contents of the prior inconsistent statement are used affirmatively to establish guilt that a defendant has been compelled to be a witness against himself.* Moreover, the distinction between using a statement to negative the existence of facts proposed by a defendant through his testimony and using a statement affirmatively to establish the existence of facts proposed by the prosecution's witnesses is easy to understand, and needs no clarification. It is a distinction that is in accordance with common sense, and, therefore, jurys are easily able to understand and follow instructions that are based upon it.

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* On one occasion while cross-examining petitioner about the first part of his prior statement, which concerned the first sale, the prosecutor inquired:

"Q. You recall those questions and answers? A. I think I do.

"Q. Were they true when you told them to me, within an hour or so after you were arrested? A. I couldn't say whether they were true or not.

"Q. You could not say whether they were true or not? A. Because I—, my joints was down and I needed drugs.

"Mr. Facelle: If your Honor please, may we have the witness answer?

"The Court: No, the witness answered. He said that I can't tell you whether they were true or not. He has answered" (450; A59).

The prosecutor's reference to truth was not repeated and had no effect on the outcome. Petitioner did not acknowledge the truth of his statement, the court told the jury that his statement was not to be considered for its truth, and he was not convicted under the count to which the reference related.

The fact that the adoption of the *Walder* rationale by the New York Court of Appeals will lead a defendant to think twice before swearing falsely does not, contrary to petitioner's contention (brief, p. 16), place an unconstitutional "condition" on the exercise of his privilege to testify in his own behalf. The right of every defendant in New York to appear as a "witness" in his own behalf is unconditional. There is no constitutional right to commit perjury. *Bryson* v. *United States*, 396 U.S. 64 (1969); *United States* v. *Knox*, 396 U.S. 77 (1969). Once a defendant is sworn as a witness he is under an obligation to testify truthfully. If he violates that obligation he is not in a position to complain because his previously excluded statement is used to expose the fact that his trial testimony is false. Nor does the exercise of a defendant's right to appear as a "witness" in his own behalf need that kind of a fence around it. Leaving the prosecution free to use an inadmissible statement to discredit false testimony will have the effect of discouraging perjury. The only defendants who will be forced to hesitate before testifying will be those who, like Viven Harris, desire to testify falsely.

This Court's recent decisions eliminating the possibility that a defendant will be deterred from asserting his constitutional rights through fear that the State will then be able to use his testimony against him do not impinge upon the sound policy underlying the New York rule. In *Simmons* v. *United States*, 390 U.S. 377 (1968) and in *Harrison* v. *United States*, 392 U.S. 219 (1968), the testimony deemed unconstitutionally compelled was used by the prosecution as part of its direct case to establish the defendant's guilt. Use of a prior inconsistent statement to impeach direct testimony undermines a defendant's credibility

as a witness; and is not used to establish his guilt. Thus in *Simmons* and in *Harrison*, unlike the case now before this Court, constitutionally defective proof was admitted as part of the case against the defendant. In this case, the contested evidence was used during cross-examination to impeach the defendant's direct testimony.

Petitioner also contends that in *Walder* this Court "failed to distinguish between irrelevant and inadmissible evidence" (brief, p. 12, fn). Evidently petitioner has been confused by the fact that Walder was not being tried on a charge of possessing the narcotics that were used to impeach his trial testimony. That fact did not render the impeaching material "irrelevant"; it related directly to his trial testimony. The thrust of Walder's defense was that he could not have sold narcotics on this occasion because he had never had narcotics in his possession on any occasion. Thus the fact that narcotics had been found in his home on an earlier occasion, albeit illegally, was probative to an assessment of his credibility as a witness. That the indictment did not stem from that possession did not go to the heart of the rationale behind permitting impeachment. The use of this material was approved, not because it was "collateral" to the prosecution's case but because it was probative in assessing the truthfulness of the defendant's case.

Petitioner also claims error in that his prior inconsistent statement related directly to the crime charged (brief, p. 20). Other than barring the use of a collateral statement on the grounds of remoteness, there is no valid distinction for impeachment purposes between a statement concerning the essential elements of the crime charged and a statement

dealing with collateral matters. A rule proscribing use of a statement directly related to the crime charged cannot be justified in terms of the rationale of *Walder*. Indeed, prior inconsistent statements on material matters are more worthy of admissibility than statements on collateral matters when credibility is in issue at a trial. Moreover, a distinction based on that ground is not consistent with this Court's opinion in *Walder*. Given the facts of *Walder*, the prior possession of heroin could not have been used as impeaching material if Walder had merely denied "all the elements of the case against him" [*Walder* v. *United States*, 347 U.S. at 65], because it would only have established that he was a person who had a tendency to commit the crime charged. It was not available as evidence of bad character since, by definition, Walder could not be accused of having committed the earlier crime. It acquired probative value, however, when Walder conveyed to the jury his defense that he had never possessed heroin on any occasion. If, as one court has held [*Blair* v. *United States*,* 401 F.2d 387 (D.C. Cir. 1968); see also, *Johnson* v. *United States*, 344 F.2d 163 (D.C. Cir. 1964)], a defendant is free to create a false alibi defense "without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it" [*Walder* v. *United States*, *supra*, at 65], then only the result of *Walder* still stands, the rationale has been destroyed.

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* *Curry* v. *United States*, 358 F.2d 904 (2d Cir. 1966), is not in point. There the government was permitted, in the interests of truth, to "use this illegally obtained evidence *to establish facts* collateral to the ultimate issue of guilt" (*Id.* at 910) (emphasis supplied). Under the New York rule, however, the impeaching statement cannot be used to establish the facts contained in it, only its existence may be independently established.

Petitioner contends that "inherent in the rationale" permitting impeachment is the "suggestion" that he lied either at the trial or when making the statement and "[t]his is a completely impermissible consideration in determining constitutionality of such a statement" (brief, p. 18). That is not the rationale behind impeachment. A defendant's prior inconsistent statement is probative in testing the veracity of his trial testimony, provided that the inconsistency relates to that testimony and is not remote. It is for the jury, not the trial court, to decide whether the defendant was lying when he testified. If the statement is probative to an assessment of the defendant's credibility, the State is not required to establish beyond a reasonable doubt that the defendant's trial testimony was false before being allowed to use the prior statement to impeach him. The ultimate aim is that if the defendant is lying he will not be able to conceal that fact by hiding behind the exclusion of the statement as evidence in chief. And in this case it is plain that the jury did not find the petitioner to be a truthful witness.* If the jury had accepted the facts proposed by petitioner he would have been acquitted on both counts; he was not. In fact, during the sentencing

* Respondent concludes that the jury must have believed Harris's denial that he sold drugs on January 4th. [He argues (brief, p. 32) that the impeachment must have "failed" "for by their disposition of the first count the jury almost expressly stated that they could not brand his testimony as false."] That surprising assertion is based on an incorrect analysis of the effect on the jury's deliberations when they conclude that a defendant has lied. The jury cannot find that a defendant committed the crime charged merely because his testimony denying it is false. They must be satisfied of his guilt, beyond a reasonable doubt, based on the evidence and a lie is not evidence of anything. A false denial cannot be used as evidence tending to establish the existence of the fact denied. A jury must acquit a defendant found to be a liar when there is insufficient evidence tending to establish his guilt. And that is what left the jury unable to agree in the case at bar.

proceedings, the trial court was moved to comment upon petitioner's deliberate attempt to deceive the jury by lying on the witness stand (minutes of sentencing, pp. 5-6). Even Mr. McHugh, an associate of petitioner's trial counsel who represented Harris at sentencing, conceded that petitioner had committed perjury:

> "He has come under the influence of John Smith and other jailhouse lawyers who are there, who are putting these people up to these things. He had some notes in his possession from John Smith and I think, Your Honor, without judging his testimony since I didn't hear all of it, that if, and Your Honor certainly did, and I bow to Your Honor's characterization of it, but he said things and did things in the trial and on the stand which were improper, and I certainly think they were, that he did it in mitigation, I may say, because he chose to listen to the advice of some of these jailhouse lawyers" (*id.* at p. 8).

The New York courts have applied this rationale in situations far more compelling than the one confronting this Court in *Walder* v. *United States, supra.* In *Walder*, the police conduct was unlawful at the time it was engaged in; here, no constitutional infirmity attended the obtaining of this statement. See also *People* v. *Kulis*, 18 N.Y.2d 318 (1966); *People* v. *Miles*, 23 N.Y.2d 527 (1969); *People* v. *Boodie*, 26 N.Y.2d 779 (1970); *People* v. *Hudson*, 26 N.Y. 2d 781 (1970); *People* v. *Johnson*, 27 N.Y.2d 119 (1970). On January 7, 1966, when Assistant District Attorney Facelle questioned petitioner there was no requirement that a suspect be advised of his right to have counsel present or that if he could not afford counsel one would be provided for him. These warnings were not made obligatory by this

Court until June 13, 1966, six months after the questioning of petitioner. Indeed, this good faith reliance on the absence of procedural mandates was the decisive factor in convincing this Court that its rulings in *Miranda* v. *Arizona*, *supra*, should be denied retroactive effect:

> "Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege." *Johnson* v. *New Jersey*, 384 U.S. 719, 732-3 (1966) *supra*.

However, "in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted" [*Jenkins* v. *Delaware*, 395 U.S. 213, 219 (1969)], this Court bypassed the more reasonable date for prospective application—the date of questioning [*Desist* v. *United States*, 394 U.S. 244 (1969); *Stovall* v. *Denno*, 388 U.S. 293 (1967)]—and selected the date on which the trial commenced. Since the rationale dictating prospective application was the reasonable reliance by law enforcement agencies upon the law existing at the time of the interrogation, rejection of the date of reliance inevitably produced an arbitrary result. Voluntary statements obtained in good faith reliance on standards this Court had "expressly declined to condemn" [*Johnson* v. *New Jersey*, *supra*, at 731] were nevertheless unavailable as evidence in chief if the trial had not yet commenced when the new procedural safeguards were announced.

In the end, a decision designed to secure future compliance and expressly excusing prior failure to comply had the unintended effect of penalizing conduct deemed constitutional at the time it occurred. Unfortunately, in a limited class of cases where other evidence in chief was available to the prosecution, certain defendants, including the petitioner in this case, not content with this Court's discretionary extension of the benefits of *Miranda* to them, took the witness stand and attempted to secure an acquittal by means of a manufactured defense. That reliance on perjury should not be rewarded by extending the protection of *Johnson* beyond its original purpose of benefiting a defendant whose statement was obtained prior to June 12, 1966, by excluding it as proof of guilt. Just as society has a "legitimate concern that convictions already validly obtained not be needlessly aborted," [*Jenkins* v. *Delaware*, *supra*], so it has an equally compelling interest in using a validly obtained confession to prevent a defendant from securing an acquittal by resorting to perjury.

Throughout the country, as petitioner has pointed out (brief, pp. 12-15), a number of state and federal courts have concluded that in *Miranda* this Court condemned impeachment [*Blair* v. *United States*, *supra*, 401 F.2d 387 (D.C. Cir. 1968); *Proctor* v. *United States*, 404 F.2d 819 (D.C. Cir 1968); *Groshart* v. *United States*, 392 U.S. 172 (9th Cir. 1968); *United States* v. *Fox*, 403 F.2d 97 (2d Cir. 1968); *Commonwealth* v. *Padgett*, 428 Pa. 229, 237 A.2d 209 (1968) (dicta); *Commonwealth* v. *Robinson*, 428 Pa. 458, 239 A.2d 308 (1968); *People* v. *Marsh*, 14 Mich. App. 518, 165 N.W.2d 853, 859 (1968); *State* v. *Galasso*, 217 So.2d 326 (Fla. 1968); *Franklin* v. *State*, 6 Md. App. 572, 252 A.2d

487 (1969)]. Those courts were wrong. They were confused by the occurrence of the word "impeach" in a single passage that dealt only with why no distinction would be drawn when excluding evidence of guilt between statements that are inculpatory and statements that are exculpatory. As the language employed in that passage demonstrates, this Court was considering the use of a statement, whether inculpatory or exculpatory, to establish guilt regardless whether that use occurred in the direct case or during cross-examination. That passage contains no reference to the use of a statement to test credibility, it is confined to the question of the admissibility of statements as evidence of guilt:

> "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any

> other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself." *Miranda* v. *Arizona*, 384 U.S. 436, 476-7.

Unlike those courts that have rejected impeachment because of this one passage without even considering the sound policy behind permitting the prosecution to discredit perjury, this Court is under no compulsion to regard the issue as settled. The question of cross-examining a defendant was not before this Court in *Miranda*. And not once in the course of that opinion was any mention made of this Court's decision in *Walder* v. *United States, supra*. Surely it is not customary for this Court to overrule its own decisions without adverting to that fact. Moreover, an acceptance of petitioner's reading of that passage would treat this Court's dicta in *Miranda* as broader than the holding. *Miranda* is confined to statements obtained without the procedural safeguards; *Walder*, on the other hand, extends to all material that is unavailable as evidence in chief, regardless of the reason for its exclusion.

There is a crucial difference between the effect of barring cross-examination of a defendant and the effect of excluding direct evidence of his guilt. The jury has no function to perform with respect to direct evidence that has been excluded, whether the reason for the exclusion was constitutional, as in this case, or evidentiary. And while this may cause the jury to decide that there is insufficient evidence tending to establish a fact in issue, it does not alter the jury's ability to arrive at a reliable finding based on the evidence before it. In contrast, the jury does have a function to perform when a witness has testified to a pro-

posed set of facts. They must decide whether the witness is a reliable proponent of those facts. Therefore, while excluding direct evidence only affects the jury's ability to know all of the facts, whether relevant or not, barring impeaching evidence undermines the jury's ability to correctly assess credibility and thus to reliably determine the facts in issue.

Petitioner, drawing false comfort from *Bruton* v. *United States*, 391 U.S. 123 (1968), disputes this analysis. He argues that the jury will treat the prior inconsistent statement as direct evidence of guilt if this Court adopts the New York rule permitting impeachment. His response is not persuasive. The use of a defendant's prior inconsistent statement to discredit his trial testimony, unlike the introduction of a co-defendant's confession, does not create a "substantial risk that the jury, despite instructions to the contrary, [will look] to the incriminating extrajudicial statements in determining [the defendant's] guilt" [*Bruton* v. *United States*, *supra*, at 123]. The impeaching statement, in contrast to a co-defendant's confession, is not introduced as direct evidence of guilt and the jury is not asked to consider the truth or falsity of the assertions contained in it. The jury is permitted to hear the prior inconsistent statement for the exclusive purpose of determining the weight and credibility which they should attach to the testimony given by the defendant from the witness stand. The significance of the existence of an earlier conflicting statement to their assessment of the defendant's trial testimony will be readily apparent to the jury and this will render it easy for them, if they conclude that the defendant did, in fact, make the earlier statement, to use the statement only when

they are evaluating the truthfulness of his sworn testimony. Thus, where a statement is used to impeach a defendant, clear and forceful limiting instructions will be adequate to insure that the jury uses the statement only for the purpose of assessing the defendant's credibility. An analogous situation arose in *Frazier* v. *Cupp*, 394 U.S. 731 (1969), when the prosecutor outlined the testimony of a witness during his opening statement. That opening statement was not evidence of the defendant's guilt and the subsequent non-appearance of the witness did not create a substantial risk that the jury would disregard the court's instructions.

An entirely different situation is presented when a co-defendant's confession implicating the defendant is introduced at their joint trial. The co-defendant's confession is admitted as part of the prosecution's proof that the co-defendant is guilty and it is offered for the truth of its contents. Thus, the jury is actually required, as part of their deliberations, to pass upon the accuracy and reliability of the co-defendant's confession. It is this which creates the substantial risk that the jury will be unable to follow an instruction limiting this evidence to the question of the co-defendant's guilt. For having decided that the statement is truthful they are then asked to wipe from their minds that portion of the truthful narrative which implicates the defendant. No similar difficulty confronts the jury under the New York rule permitting impeachment. The prior inconsistent statement is not used to establish the defendant's guilt and it is not offered for the truth of its contents. Thus, the statement is not part of the evidence in the case and the jury is not required to determine

whether or not it contains an accurate recitation of the facts. It is a cornerstone of the jury system that jurors can and do follow the instruction that they arrive at their decision solely on the basis of the evidence actually admitted at the trial:

> "Even if it is unreasonable to assume that a jury can disregard a co-conspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial." *Frazier* v. *Cupp*, 394 U.S. 731, 736 (1969).

Indeed, petitioner's trial demonstrates that juries are able to follow an instruction limiting their use of a prior inconsistent statement. For, Harris's statement contains a confession that he had sold drugs to Detective Bermudez on January 4th, and if the jury had not followed the court's instructions, they would have found him guilty of that act.

Moreover, even if the jury had not proved capable of abiding by the court's limiting instructions, the use of petitioner's statement would not have violated his privilege against self-incrimination. That statement was not obtained under circumstances which violated either the traditional test of voluntariness or the petitioner's right to counsel. Consequently, it cannot be regarded as an "involuntary" statement within the meaning of the privilege. The subsequently announced right to have access to an attorney during any in-custody questioning is a fence erected around the privilege in order to safeguard it. A suspect must be informed about his right to counsel, under *Miranda*, not because it is essential that a lawyer be present

in the station house on all occasions but because it is essential that a suspect understand that he does not have to respond to questioning unless he wants to and appreciates the consequences if he does decide to answer questions. That fence around the privilege had not yet been erected, however, when petitioner's question and answer statement was taken; it was not erected until *Miranda* was decided. Therefore, the fact that petitioner was not informed of his right to have counsel present during the questioning did not render the statement "involuntary" at the time of his trial. It was excluded as evidence of guilt on the People's case because it was inadmissible under *Miranda* and *Johnson*, not because it was involuntary or in any sense "compelled." The selection of an appropriate date for prospective application was an exercise of discretion, and was not constitutionally compelled.

Petitioner further claims that under the New York rule a defendant is deprived of an opportunity to test the voluntariness of a statement used only for impeachment purposes; this claim is based on an incorrect view of New York law. He has confused a pre-trial "Huntley" hearing as to a statement used on the People's case and a voir dire testing admissibility of a statement used to impeach as respondent's brief shows. Under New York procedure a defendant who is objecting to this use of his statement may request a voir dire to establish the circumstances under which it was obtained. At his election, the voir dire may be held in the absence or in the presence of the jury. When the voir dire has ended the trial court, in the exercise of its discretion to control the scope of cross-examination, will rule on whether the statement may be used for impeach-

ment purposes. Thus, for example, if on the voir dire the defendant establishes that the statement was extracted from him through the application of physical force, the trial court would not permit the State to use the statement for impeachment purposes; a situation not, of course, present in this case.*

To counterbalance the undeniable need for a full and searching inquiry into a defendant's credibility as a witness, petitioner only speculates as to the effect the New York rule may have on the future course of in-custody questioning. He argues that the New York rule "encourages [law enforcement officials] to flagrantly violate" the procedural safeguards mandated in *Miranda* "in the hope that the fruits of such violations will be rewarded" when, at the subsequent trial, the accused takes the stand in his own behalf, or declines to testify for fear of impeachment by his prior statement. This speculation is inappropriate in the present context. The statement used to impeach petitioner was obtained before *Miranda*, thus acceptance of the New York rule on the facts of this case cannot have the effect of altering past conduct since law enforcement officials could not have deliberately refrained from employing specific safeguards that this Court had not yet announced were obligatory upon them. Nor will allowing this

* A confession extracted through physical or psychological force cannot be used as a prior inconsistent statement because it offends our sense of justice. And, by definition, a coerced confession is not one the defendant was willing to make, consequently it has no probative value in assessing his credibility. The prosecution cannot be heard to say the defendant has been willing to give different accounts of the same event when the State has extracted the account on one of those separate occasions. An involuntary statement may also be untruthful but that is not a factor in the decision to disallow its use; the statement is not offered for the truth of its contents.

use in cases where the suspect was questioned after *Miranda* encourage law enforcement officials who are presently conducting investigations to wilfully violate the specific mandates of *Miranda*. Indeed, there is not one fact in the record or in petitioner's brief to support the speculation that law-enforcement officials will deliberately defy this Court's mandate unless they are aware that even if a defendant resorts to perjury at his subsequent trial the State will not be able to use the statement thus obtained. The technique of impeachment during cross-examination was not devised in response to this Court's decision in *Miranda*. The question whether to permit a defendant to be impeached by a prior statement which is inadmissible on the State's direct case did not arise as a result of *Miranda* and a rule prohibiting impeachment in this case will not be confined to statements that are inadmissible because they were not obtained in compliance with the procedural safeguards mandated in *Miranda*. Nor has it ever been suggested that permitting impeachment in pre-*Miranda* cases had the effect of encouraging police officers to engage in illegal conduct.

What petitioner fears is not a fact but a risk. Viewed in that light, there may be a risk that an individual police officer, indifferent to the fact that his questioning will not result in a statement admissible in court, is so devious that he questions a suspect for the sole purpose of providing material to impeach the suspect if the case does not result in a plea of guilty and if the suspect takes the stand in his own behalf. But the ordinary aim of questioning is to discover the truth of the suspect's involvement in the crime and the average police officer in this country is too busy to indulge in the absurdity of questioning suspects in the hope

that the results of that questioning will be useful if the suspect should decide at a later date not to tell the truth when he testifies. And of course, the alleged risk is not involved in this case, since the investigators acted properly under the standards applicable at the time.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
SYBIL H. LANDAU
Assistant District Attorneys
Of Counsel

October, 1970

OPINION

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HARRIS *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 206. Argued December 17, 1970—Decided February 24, 1971

Statement inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by *Miranda* v. *Arizona*, 384 U. S. 436, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of defendant's trial testimony. See *Walder* v. *United States*, 347 U. S. 62. Pp. 2–4.

25 N. Y. 2d 175, 250 N. E. 2d 349, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which HARLAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., dissented. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 206.—October Term, 1970

Viven Harris, Petitioner, v. State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[February 24, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an undercover police officer. At a subsequent jury trial the officer was the State's chief witness, and he testified as to details of the two sales. A second officer verified collateral details of the sales, and a third offered testimony about the chemical analysis of the heroin.

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer but denied a sale on January 4. He admitted making a sale of contents of a glassine bag to the officer on January 6 but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7—statements that partially contradicted petitioner's direct testimony at trial. In response to the cross-examination,

petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At request of petitioner's counsel the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt. In closing summations both counsel argued the substance of the impeaching statements. The jury then found petitioner guilty of the second count of the indictment.[1] The New York Court of Appeals affirmed in a *per curiam* opinion, 25 N. Y. 2d 175, 250 N. E. 2d 349 (1969).

At trial the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner, conceding that they were inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The transcript of the interrogation used in the impeachment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effec-

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[1] No agreement was reached as to the first count. That count was later dropped by the State.

tively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

In *Walder* v. *United States*, 347 U. S. 62 (1954), the Court permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes.

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.
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> ". . . [T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U. S., at 65.

It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*. The conflict between petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged

thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox*, 396 U. S. 77 (1969); cf. *Dennis* v. *United States*, 384 U. S. 855 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.[2] Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Affirmed.

MR. JUSTICE BLACK dissents.

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[2] If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a "fruit" of his confession, free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution. Compare *Killough* v. *United States*, 114 U. S. App. D. C. 305, 315 F. 2d 241 (CADC 1962).

SUPREME COURT OF THE UNITED STATES

No. 206.—October Term, 1970

Viven Harris, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[February 24, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

It is conceded that the question-and-answer statement used to impeach petitioner's direct testimony was, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), constitutionally inadmissible as part of the State's direct case against petitioner. I think that the Constitution also denied the State the use of the statement on cross-examination to impeach the credibility of petitioner's testimony given in his own defense. The decision in *Walder* v. *United States*, 347 U. S. 62 (1954), is not, as the Court today holds, dispositive to the contrary. Rather, that case supports my conclusion.

The State's case against Harris depended upon the jury's belief of the testimony of the undercover agent that petitioner "sold" the officer heroin on January 4 and again on January 6. Petitioner took the stand and flatly denied having sold anything to the officer on January 4. He countered the officer's testimony as to the January 6 sale with testimony that he had sold the officer two glassine bags containing what appeared to be heroin, but that actually the bags contained only baking powder intended to deceive the officer in order to obtain $12. The statement contradicted petitioner's direct testimony as to the events of both days. The statement's version of the events on January 4 was that the officer had used petitioner as a middleman to buy some heroin from a

third person with money furnished by the officer. The version of the events on January 6 was that petitioner had again acted for the officer in buying two bags of heroin from a third person for which petitioner received $12 and a part of the heroin. Thus, it is clear that the statement was used to impeach petitioner's direct testimony not on collateral matters but on matters directly related to the crimes for which he was on trial.[1]

Walder v. *United States* was not a case where tainted evidence was used to impeach an accused's direct testimony on matters directly related to the case against him. In *Walder* the evidence was used to impeach the accused's testimony on matters *collateral* to the crime charged. Walder had been indicted in 1950 for purchasing and possessing heroin. When his motion to suppress use of the narcotics as illegally seized was granted, the Government dismissed the prosecution. Two years later Walder was indicted for another narcotics violation completely unrelated to the 1950 one. Testifying in his own defense, he said on direct examination, that he had never in his life possessed narcotics. On cross-examination he denied that law enforcement officers had seized narcotics from his home two years earlier. The Government was then permitted to introduce the testimony of one of the officers involved in the 1950 seizure, that when he had raided Walder's home at that time he had seized narcotics there. The Court held that on facts where "the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics," 347

[1] The trial transcript shows that petitioner testified that he remembered making a statement on January 7; that he remembered a few of the questions and answers; but that he did not "remember giving too many answers." When asked about his bad memory, petitioner, who had testified that he was a heroin addict, stated that "my joints was down and I needed drugs."

U. S., at 65, the exclusionary rule of *Weeks* v. *United States*, 232 U. S. 383 (1914), would not extend to bar the Government from rebutting this testimony with evidence, although tainted, that petitioner had in fact possessed narcotics two years before. The Court was careful, however, to distinguish the situation of an accused whose testimony, as in the instant case, was a "denial of complicity in the crimes of which he was charged," that is, where illegally obtained evidence was used to impeach the accused's direct testimony on matters directly related to the case against him. As to that situation, the Court said:

> "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U. S., at 65.

From this recital of facts it is clear that the evidence used for impeachment in *Walder* was related to the earlier 1950 prosecution and had no direct bearing on "the elements of the case" being tried in 1952. The evidence tended solely to impeach the credibility of the defendant's direct testimony that he had never in his life possessed heroin. But that evidence was completely unrelated to the indictment on trial and did not in any way interfere with his freedom to deny all elements of that case against him. In contrast, here, the evidence used for impeachment, a statement concerning the details of the very sales alleged in the indictment, was directly related to the case against petitioner.

While *Walder* did not identify the constitutional specifics which guarantee "a defendant the fullest opportunity to meet the accusation against him . . . [and

permit him to] be free to deny all the elements of the case against him," in my view *Miranda* v. *Arizona*, 384 U. S. 436 (1966), identified the Fifth Amendment's privilege against self-incrimination as one of those specifics.[2] That privilege has been extended against the States. *Mallоy* v. *Hogan*, 378 U. S. 1 (1964). It is fulfilled only

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[2] Three of the five judges of the Appellate Division in this case agreed that the State's use of petitioner's illegally obtained statement was an error of constitutional dimension. *People* v. *Harris*, 31 App. Div. 2d 828 (1968). However, one of the three held that the error did not play a meaningful role in the case and was therefore harmless under our decision in *Chapman* v. *California*, 386 U. S. 18 (1967). He therefore joined in affirming the conviction with the two judges who were of the view that there was no constitutional question involved. 31 App. Div. 2d, at 830. I disagree that the error was harmless and subscribe to the reasoning of the dissenting judges, *id.*, at 831–832:

"Under the circumstances outlined above, I cannot agree that this error of constitutional dimension was 'harmless beyond a reasonable doubt' (*Chapman* v. *California*, 386 U. S. 18, 24). An error is not harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (*Fahy* v. *Connecticut*, 375 U. S. 85, 86–87). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (*Chapman* v. *California, supra*). Surely it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the Jan. 4 charge (cf. *Anderson* v. *Nelson*, 390 U. S. 523, 525). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's. The judgment should be reversed and a new trial granted."

The Court of Appeals affirmed *per curiam* on the authority of its earlier opinion in *People* v. *Kulis*, 18 N. Y. 2d 318, 221 N. E. 2d 541 (1966). Chief Judge Fuld and Judge Keating dissented in *Kulis* on the ground that *Miranda* precluded use of the statement for impeachment purposes, 18 N. Y. 2d, at 323, 221 N. E. 2d, at 543.

when an accused is guaranteed the right "to remain silent unless he chooses to speak in the *unfettered* exercise of his own will," *id.*, at 8 (emphasis added). The choice of whether to testify in one's own defense must therefore be "unfettered," since that choice is an exercise of the constitutional privilege, *Griffin* v. *California*, 380 U. S. 609 (1965). *Griffin* held that comment by the prosecution upon the accused's failure to take the stand or a court instruction that such silence is evidence of guilt is impermissible because it "fetters" that choice—"[i]t cuts down on the privilege by making its assertion costly." *Id.*, at 614. For precisely the same reason the constitutional guarantee forbids the prosecution from using a tainted statement to impeach the accused who takes the stand: The prosecution's use of the tainted statement "cuts down on the privilege by making its assertion costly." *Ibid.* Thus, the accused is denied an "unfettered" choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.[3] We settled this proposition in *Miranda* where we said:

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner. . . . [S]tatements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*" 384 U. S., at 476–477 (emphasis added).

[3] It is therefore unnecessary for me to consider petitioner's argument that *Miranda* has overruled the narrow exception of *Walder* admitting impeaching evidence on collateral matters.

This language completely disposes of any distinction between statements used on direct as opposed to cross-examination. "An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn." *People* v. *Kulis*, 18 N. Y. 2d 318, 324, 221 N. E. 2d 541, 542 (1966) (dissenting opinion).

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The "essential mainstay" of that system, *Miranda* v. *Arizona*, 384 U. S., at 460, is the privilege against self-incrimination, which for that reason has occupied a central place in our jurisprudence since before the Nation's birth. Moreover, "we may view the historical development of the privilege as

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[4] Six federal Courts of Appeals and appellate courts of 14 States have reached the same result. *United States* v. *Fox*, 403 F. 2d 97 (CA2 1968); *United States* v. *Pinto*, 394 F. 2d 470 (CA3 1968); *Breedlove* v. *Beto*, 404 F. 2d 1019 (CA5 1969); *Groshart* v. *United States*, 392 F. 2d 172 (CA9 1968); *Blair* v. *United States*, 401 F. 2d 387 (CADC 1968); *Wheeler* v. *United States*, 382 F. 2d 998 (CA10 1968); *People* v. *Barry*, 237 Cal. App. 2d 154 (1965), cert. denied, 386 U. S. 1024 (1967); *Velarde* v. *People*, 466 P. 2d 919 (Colo. 1970); *State* v. *Galasso*, 217 So. 2d 326 (Fla. 1968); *People* v. *Luna*, 37 Ill. 2d 299, 226 N. E. 2d 586 (1967); *Franklin* v. *State*, 6 Md. App. 572, 252 A. 2d 487 (1969); *People* v. *Wilson*, 20 Mich. App. 410, 174 N. W. 2d 79 (1969); *State* v. *Turnbow*, 67 N. M. 241, 354 P. 2d 533 (1960); *State* v. *Catrett*, 276 N. C. 86, 171 S. E. 2d 398 (1970); *State* v. *Brewton*, 247 Ore. 241, 422 P. 2d 581, cert. denied, 387 U. S. 943 (1967); *Commonwealth* v. *Padgett*, 428 Pa. 229, 237 A. 2d 209 (1968); *Spann* v. *State*, 448 S. W. 2d 128 (Tex. Cr. App. 1969); *Cardwell* v. *Commonwealth*, 209 Va. 412, 164 S. E. 2d 699 (1968); *Gaertner* v. *State*, 35 Wis. 2d 159, 150 N. W. 2d 370 (1967); see also *Kelly* v. *King*, 196 So. 2d 525 (Miss. 1967). Only three state appellate courts have agreed with New York. *State* v. *Kimbrough*, 109 N. J. Super. 57, 262 A. 2d 232 (1970); *State* v. *Butler*, 19 Ohio St. 2d 55, 249 N. E. 2d 818 (1969); *State* v. *Grant*, 459 P. 2d 639 (Wash. 1969).

one which groped for the proper scope of governmental power over the citizen. . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens." *Ibid.* These values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes. Moreover, it is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio*, 367 U. S. 643, 659 (1961). Thus, even to the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* can't be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.